49660

HENRY SZYMANOWSKI,	)	(64 I.A.2 126)
Plaintiff-Appellee,	)	APPEAL FROM THE
vs.	)	MUNICIPAL COURT OF
ROYAL B. KELLOGG,	)	CHICAGO.
Defendant-Appellant.	)	

MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

Suit for personal injuries was filed in 1957. Default was entered against defendant in 1958 for failure to appear, and a judgment for $3,000 was entered on March 23, 1962. A motion to vacate the judgment was filed by defendant on November 1, 1963. From a denial of his motion on January 16, 1964 defendant has appealed.

Substituted service of process on defendant was sought to be accomplished under the terms of the Illinois Motor Vehicle Law. Section 9-301 of that act (Ill. Rev. Stat., ch. 95 1/2, § 9-301) provides in pertinent part:

> (a) The use and operation by any person or his duly authorized agent or employee of a motor vehicle or motorcycle over or upon the highways of the State of Illinois, shall be deemed an appointment by such person of the Secretary of State to be his true and lawful attorney upon whom may be served all legal process in any action or proceeding against him, growing out of such use or resulting in damage or loss to person or property, and said use or operation shall be signification of his agreement that any such process against him which is so served, shall be of the same legal force and validity as though served upon him personally if such person is a non-resident of this State * * *.
>
> (b) Service of such process shall be made by serving a copy upon the Secretary of State or any employee in his office designated by him to accept such service for him, or by filing such copy in his office, together with a fee of $2.00 and such service shall be sufficient service upon said person, if notice of such service and a copy of the process are, within 10 days thereafter, sent by registered mail by the plaintiff to the defendant, at the last known address of the said defendant, and the plaintiff's affidavit of compliance herewith is appended to the summons.
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> * * *
>
> (e) When a final judgment is entered against any non-resident defendant who shall not have received notice

> of service and a copy of the process by registered mail, required to be sent him as above provided, and such person, * * * shall within one year after the notice in writing given him of such judgment, or within 5 years after such judgment, if no such notice has been given, as aforesaid, appear in open court and petition to be heard touching the matter of such judgment, and shall pay such costs as the court may deem reasonable in that behalf, the person so petitioning may appear and answer the plaintiff's allegations, and thereupon such proceeding shall be had as if the defendants had appeared in due season and no judgment had been rendered.

Defendant's motion to vacate was a pro forma one embodied in his notice of motion. We must therefore look to his affidavit in support of the motion to find its substance. The allegations of the affidavit read in their entirety as follows:

> 1. That on March 28, 1962, an ex parte judgment in the amount of $3000.00 and costs was entered against your affiant.
>
> 2. That service of summons was alleged to be had upon your affiant pursuant to provisions of the Illinois Motor Vehicle Act Section 9-301 thereof.
>
> 3. That the first notice of this judgment that your affiant received was a letter addressed to your affiant at 5049 Scenic Drive, Pittsburgh 36, Pennsylvania, which letter was addressed from the Clerk of the Municipal Court of Chicago.
>
> 4. That since receiving this letter your affiant has engaged an attorney, Rolf R. Larsen, of Pittsburgh, Pennsylvania, to investigate the circumstances surrounding this judgment.
>
> 5. That as a result of this investigation, it has been determined by your affiant that the service upon which default judgment was previously entered herein, was based on an affidavit of compliance showing service to be made upon this affiant, by mailing a copy of the summons to affiant on December 11, 1958, to Windsor, Connecticut, whereas your affiant on December 11, 1958, lived at 18 Progress Avenue, Rockville, Connecticut.
>
> 6. Your affiant now desires to appear and defend the claim presented in the above entitled cause, and has a good and meritorious defense to such claim in that the damage sustained is minor property damage and to the best of affiant's knowledge no one involved received personal injuries.

Whether made under Section 9-301 (e) as quoted above, or under Section 72 of the Civil Practice Act (Ill. Rev. Stat.,

ch. 110, § 72), this motion is insufficient on its face. We shall not go into the reasons therefor since defendant, in effect, concedes its insufficiency by basing his principal argument in this court on the proposition that the judgment was void for lack of jurisdiction, citing Forsberg v. Harris, 27 Ill. App. 2d 159, 175 and Rompza v. Lucas, 337 Ill. App. 106. While, as can be seen in defendant's affidavit, this point was not raised in the trial court, nevertheless, it is true that a void judgment may be attacked at any time, and in any court, so we shall consider defendant's contentions in this regard.

It is pointed out that a substituted service statute requires strict compliance. This we acknowledge. Schueren v. Querner Truck Lines, 22 Ill. App. 2d 183, 191. It is then argued that the trial court never acquired jurisdiction over defendant because plaintiff did not file the necessary statutory affidavit showing that he had complied with the act (Section 9-301 (b) quoted above) in the serving of summons upon the Secretary of State and in the mailing of notice thereof, etc., to defendant. This is a strange argument, indeed, since defendant's affidavit in support of his motion to vacate the judgment makes specific reference to the fact that judgment had been entered on the basis of such an affidavit of compliance.

Prior to argument of the case in this court, our attention was called to the fact that the file did not contain an affidavit of compliance. On plaintiff's motion, however, it was made to appear, by affidavit of counsel and otherwise, that there had been such an affidavit in the file; that it had been seen there by plaintiff's attorney from time to time during pendency of the case in the trial court; that counsel for both parties had been in possession of copies of such an affidavit, there being no dispute

as to its contents but only as to whether or not it had ever been lodged in the court file. It seemed to us a matter of no consequence that there was no notation of an affidavit of compliance on the trial court's "half sheet" for the case, because Section 9-301 (b) does not require that such an affidavit be "filed" but only that it be "appended to the summons." Further, in preparation of the record for filing in this court, defendant himself, by his attorney, had served notice of a motion in the trial court to restore the file because of its having been lost or destroyed, and submitted in support of the motion copies of the various documents to be restored. Included among such papers was an unsigned copy of the affidavit of compliance (indicating that it had been executed on December 18, 1958, seven days after service on the Secretary of State and mailing notice, etc., to defendant) and the motion to restore the file informed the court that such an affidavit, signed by plaintiff's attorney, had been previously filed in the cause. Before this motion was acted upon the file was found, but it did not then contain an affidavit of compliance.

Considering all these matters, we ordered the file restored by the inclusion of the affidavit of compliance. Defendant, wishing opportunity to make further argument on the point, made a motion to vacate and the motion was taken with the case.

Defendant now attempts to explain his previous references to the fact that an affidavit of compliance had been filed, upon a mistake arising from the presence of a copy of an affidavit in the files of defendant's insurance company, and the incorrect assumption that it must therefore have been filed. Now defendant says that the absence of the affidavit from the file when the latter was found, after having been lost for many weeks, should

be taken as conclusive that the affidavit had never been properly filed. We are not impressed with this argument. For the reasons stated above, we adhere to our position in ordering restoration of the affidavit of compliance, and defendant's motion to vacate that order is denied.

The judgment of the Municipal Court of Chicago, and its order denying defendant's motion to vacate, are affirmed.

AFFIRMED.

McCORMICK, P.J., and DRUCKER, J., concur.

Publish abstract only.

49890

SALVATORE NICK MESSINA, Plaintiff-Appellant,	)	64 I.A.2171 APPEAL FROM
v.	)	CIRCUIT COURT
CITY OF CHICAGO, a Municipal Corporation, Defendant-Appellee.	)	COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This action was brought to recover damages for personal injuries sustained in a fall on a defective public sidewalk. The jury returned a verdict for plaintiff in the amount of $10,000 and judgment was entered thereon. Plaintiff appeals, requesting a new trial on the question of damages for the reason that the amount of the verdict is grossly inadequate in the light of the evidence as to loss of income and medical expenses.

On October 19, 1959, plaintiff, an insurance debit man, was on his way to make a call when the heel of his right foot caught in a broken portion of a City of Chicago sidewalk. He testified that he fell to the ground and that there was a great deal of pain in the ankle area of the right foot. He proceeded to the home of the customer, where he cleaned up, and immediately went home and retired. For a week or ten days after the accident the right foot was soaked in warm water and epsom salts, but the pain grew worse. Plaintiff telephoned his family doctor and the foot was again soaked for the next few weeks pursuant to the doctor's instructions. The pain continued and the family doctor was again called. An appointment was arranged with Dr. Maurice Stamler, an orthopedist, for X-rays to be taken at the Columbus Hospital on November 30th.

The X-rays showed the existence of an abnormal bone mass located behind the ankle joint on the right foot, in the area where plaintiff had complained of pain to Dr. Stamler. The doctor testified

that the bone mass did not belong there, and that it needed observation because of its existence and because plaintiff had injured it. Surgery was performed by the doctor in December at the Columbus Hospital for the removal of the bone mass; a cast was applied and the plaintiff was discharged from the hospital a few days later.

Plaintiff continued in the care of Dr. Stamler, but the pain continued. Plaintiff was re-hospitalized for ten days in February of 1960 for observation, during which stay he underwent a medication treatment on the foot consisting of the insertion of a needle into the foot. Another cast was applied and upon his release plaintiff continued in the care of Dr. Stamler until he was hospitalized again in May of 1960 for another ankle operation. Dr. Stamler testified that this second operation was necessitated due to the appearance of arthritis in the joint, the restricted motion of the foot, and the continued pain and swelling. The doctor stated that the painful joint had to be eradicated, namely, the ankle joint destroyed and bone chips placed into the area where the joint had been removed, the purpose of which was to eliminate the side-to-side sway of the foot. The bone chips used in the operation were taken from plaintiff's ilium, located above the hip, necessitating an operation in that area to effect their removal. A third cast was applied and plaintiff was released from the hospital twenty days after he had been admitted.

Plaintiff continued in the care of Dr. Stamler and the condition of his foot grew worse. An infection developed in the ankle due to the operation, which was referred to by Dr. Stamler as a "surgical disaster." Plaintiff received treatment for the infection from Dr. Stamler until July of 1960, when he was referred to Dr. Sam Banks for treatment.

Dr. Banks testified that he first examined plaintiff in April of 1960 and had X-rays taken of the right ankle. The doctor

identified a fracture in the ankle portion of the right foot and also noted that there was insufficient calcium in the bones of the foot resulting from an insufficient bearing of weight upon the foot. The doctor diagnosed a condition of arthritis in the area due to a fracture involving the joints between the talus and the heel bone. An operation was recommended by Dr. Banks, which was the operation performed by Dr. Stamler in May of 1960.

Dr. Banks saw the plaintiff on July 22, 1960, and inspected the infection above referred to as the "surgical disaster." Plaintiff was admitted to the hospital on July 24th and the infected soft tissue was removed surgically. A cast was again applied and plaintiff was released on the 25th. Plaintiff again saw Dr. Banks on August 5th, at which time the cast was changed. A shorter cast was applied to allow plaintiff to place more weight on the foot in order to increase the calcium in the bones and in order to lessen the stiffening in the ankle joint which resulted from the operation. This cast was removed in September.

Dr. Banks recommended another operation in order to make a solid fusion at the site of the arthritic joint for the purpose of eliminating motion and thereby eliminating pain. The foot was again operated on in December of 1960, the bone chip plug this time being taken from plaintiff's fibula and transplanted into the ankle joint. Plaintiff was discharged from the hospital in seven days, and, after a series of cast changes, the cast was removed in March of 1961. Dr. Banks testified plaintiff continued to complain of pain in the foot and ankle, and that there was some swelling in the area and restriction of movement. The last time plaintiff consulted Dr. Banks was June 8, 1961, at which time plaintiff was given permission to work if he felt he could carry on, and was told that the eventual outcome of his condition could be determined only by an increase in foot

movement and walking by the plaintiff.

Dr. Stamler again saw plaintiff in June of 1961, at which time more X-rays were taken. The ankle joint had not healed satisfactorily and another ankle operation was performed in September. Plaintiff still had difficulty walking, was still in pain and was unable to work. A triple arthrodesis, a more involved operation than those preceeding, was suggested and performed by Dr. Stamler on November 11, 1963. Instead of using bone chips in this operation, bone segments measuring 3 by 2 by 1/4 inches were used to fuse the joint and completely eradicate the motion. Dr. Stamler testified that, at the time of trial, plaintiff had good ankle motion, that the sway from side to side was eliminated and that plaintiff had very little pain.

In response to hypothetical questions, both Dr. Stamler and Dr. Banks stated that an accident paralleling that experienced by plaintiff could have caused a physical condition paralleling that suffered by plaintiff.

Plaintiff testified that, prior to the accident, he had no trouble with his foot. He had served time in the army, coached sports teams and participated in sports, all of which he was unable to do since the accident. After the accident he stated he was in pain and unable to work to any great degree. Immediately before the accident he was employed as an insurance debit man at $100 per week, an occupation requiring a good deal of walking. Plaintiff received a leave of absence from his employer after the accident and did not work throughout the year of 1960. He worked two weeks in the summer of 1961 driving a delivery truck and assembling light furniture, and for five or six months, from the summer of 1961 until February of 1962, as an insurance investigator at $100 per week. The foot continued to hurt and he stopped work. Thereafter he attempted to find employment, but

was unable to find a job until July of 1962 when he was hired as a kitchen helper at the Cook County Hospital at $365 per month. This employment lasted some three or four months, at which time plaintiff was hospitalized for a hernia resulting from a fall while performing his duties at the hospital. Plaintiff stated that he was told to clean coffee urns which entailed the stretching of his body; that, while so stretching, he was unable to place weight on his right foot, lost his balance and fell, causing the hernia. Since the employment at the Cook County Hospital, plaintiff procured an insurance broker's license and was self-employed; he earned $200 as a broker in 1963. Plaintiff testified that he now walks with a limp. Plaintiff introduced evidence of medical bills aggregating $4,442.69 and loss of salaries of $17,800.

Initially defendant challenges the jurisdiction of this Court on the ground that plaintiff's notice of appeal is fatally defective. It appears that the final judgment in this cause was entered on March 3, 1964, and that plaintiff's motion for a new trial on the question of damages, filed March 19, 1964, was denied on May 21, 1964. While the notice of appeal refers to the May 21st order denying the motion for a new trial, it does nevertheless refer to the judgment. The notice of appeal does relate to an appealable judgment and consequently defendant's jurisdictional argument must fail. See Robson v. Pennsylvania Railroad Co., 337 Ill. App. 557.

Plaintiff maintains that during the course of the trial several prejudicial errors were committed which caused the jury to render a verdict in an amount lower than that to which the evidence clearly shows plaintiff to be entitled. We agree.

On cross-examination of the plaintiff, defense counsel inquired into an accident involving plaintiff in 1958; this line of questioning was objected to by plaintiff's counsel, but the objection was overruled. Defense counsel stated he would connect up the 1958

accident to the one involved here relative to pre-existing injuries, but such connection was never made nor any, in fact, attempted. Immediately following the court's overruling of plaintiff's objection, defense counsel asked plaintiff, "You engaged an attorney at that time and filed a lawsuit, is that correct?" Defense counsel's very next question related to an accident involving plaintiff in 1962. Plaintiff admitted the 1962 accident, and defense counsel then stated, "You didn't tell us anything about that on direct examination this morning, did you?" Again plaintiff's counsel objected, no ruling was made on the objection and defense counsel continued the questioning. Neither the 1958 accident nor the 1962 accident were brought out on direct examination of plaintiff.

One of defendant's witnesses was asked on direct examination whether plaintiff filed a claim against his employer in connection with the 1962 accident, which question the witness answered in the affirmative. Plaintiff's objection to the question as being prejudicial was overruled. When plaintiff's counsel attempted to establish the amount of the claim, defense counsel objected, stating, "That is improper. He made a claim, and that is the only thing in issue." The objection was sustained. It is significant to note at this point that before the witness was asked whether plaintiff filed a claim and whether he had collected money on the claim, the witness stated that the 1962 accident involved plaintiff's head, neck and shoulder; it in no way appeared to have involved the right foot.

During final argument, defense counsel stated that plaintiff put his medical bills into evidence. Counsel then stated that the jury would see that the bills were paid, not by plaintiff, but by someone else. An objection by plaintiff's counsel was again overruled.

A reviewing court will not interfere with the amount of verdict determined by a jury unless it appears that an injustice has been done, or that the amount of the verdict was the result of prejudice or passion. Ward v. Chicago Transit Authority, 52 Ill. App.2d 172; Kinsell v. Chicago Transit Authority, 27 Ill. App.2d 314. This is true even where the jury was properly instructed on the question of damages. Corsello v. Warren, 51 Ill. App.2d 367; Wihr v. Bruno's Appliance Sales & Service, 29 Ill. App.2d 145.

The matters brought out by the defense relative to the 1958 and 1962 accidents were clearly improper under the circumstances. They were in no way connected up with the accident here in question, nor was any attempt made to show that they were used for impeachment purposes. See Barrett v. Wallenberg, et al., __Ill. App.2d ___, 1st Dist., 2d Div., Gen. No. 49531, filed September 28, 1965. The use of this evidence, and the manner in which it was used could have no other effect than to give the jury the impression that plaintiff was "claim conscious." Indicative of this are the statements and questions of defense counsel referred to above: that plaintiff hired a lawyer and filed a lawsuit, that plaintiff failed to mention the 1962 accident on direct examination and that the filing of the 1962 claim, and not its amount, was the only matter in issue.

Furthermore, the comment made by defense counsel in final argument--that the jury would see that the medical bills were paid, not by plaintiff, but by someone else--is clearly prejudicial, especially in the light of the evidence of the 1958 and 1962 accidents. An inspection of the bills indicates they were paid by an insurance company. Not only does this make plaintiff appear to be attempting to secure a double recovery, but whether plaintiff has received compensation from a third party, whether by contract or as a gratuity,

has no bearing on the defendant's obligation to plaintiff for damages resulting from his negligence. Cooney v. Hughes, 310 Ill. App. 371, 378.

On all of the evidence it clearly appears that the jury's verdict is inadequate, even considering the pre-existing bone mass in plaintiff's foot and his failure to consult a doctor immediately after the foot was injured.

A pre-existing condition does not bar recovery for damages arising out of the aggravation of that condition which is caused by the negligence of the defendant. Steele v. Brown, 43 Ill. App.2d 293. While it is true that the pre-existing condition must be considered when assessing damages, the uncontradicted evidence shows that plaintiff had no trouble with the right foot before the accident in question, but rather had seen service in the army, was actively engaged in sports and coached sports teams. A party is also entitled to damages for any diseases arising out of the injury, such as plaintiff's foot infection and the arthritis in his ankle joint. Griswold v. Chicago Railways Co., 339 Ill. 94. The fact that plaintiff required numerous operations to correct the condition and also developed an infection due to a "surgical disaster," in no way bars recovery for the medical attention and surgery required; it does not appear that plaintiff was in any way negligent in the selection of his doctors. See Cline v. Kirchwehm Bros. Cartage Co., 42 Ill. App.2d 85.

With regard to plaintiff's failure to consult a doctor immediately after injuring the foot, it does not appear how much time plaintiff spent on the foot before seeing a doctor, nor is there any evidence as to the degree of aggravation resulting from the alleged subsequent use of the foot. Other than plaintiff's testimony that he

was not able to work as long nor make as many calls after the accident as before the accident, the only matter brought out at trial in this connection was Dr. Stamler's testimony that continued use of the foot would aggravate the injury, leaving it to conjecture as to the degree of aggravation of the condition by the plaintiff.

Finally, plaintiff raises as error the trial court's refusal to allow certain photographs of his scars into evidence. Since there is to be a new trial on the question of damages, we think that it is within the discretion of the trial court, in the light of all the evidence presented as to the operations, whether the photographs are to be admitted into evidence. Villegas v. Kercher, 11 Ill. App.2d 282.

The judgment is reversed on the issue of damages and the cause is remanded with directions for a new trial on the issue of damages.

JUDGMENT REVERSED IN PART AND
CAUSE REMANDED WITH DIRECTIONS.

BRYANT, J., and LYONS, J., concur.

50225

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
ALBERT GLENN JACKSON,
Defendant-Appellant.

64 I.A.2 217

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction by the court for the offense of attempted rape with sentence in the penitentiary for a period of from two to ten years, defendant having waived a jury trial.

On September 29, 1962, Mildred Harris, age 15, answered the doorbell at her home located at 6157 South Michigan Avenue, Chicago, Illinois. A man inquired about vacancies and requested permission to place a telephone call. Mildred's brother, Danny, was home at the time. On the evening of October 2, 1962, at about 6:00 P.M. the same man made the same inquiries of Mildred, but was not admitted. Mildred's brother, Freddie, was home at this time. On October 3, 1962, between the hours of 2:45 P.M. and 3:00 P.M. Mildred again answered the doorbell and opened the door slightly. A man later identified as defendant forced his way in the house and put his hand over Mildred's mouth and dragged her into the bedroom. He grabbed her in the chest, tore off her clothes and attempted to rape her. Mildred said her brother was coming home and defendant left. Mildred sought the assistance of a neighbor and the police were called. She was taken to Billings Hospital where she stayed for two weeks. On all three occasions the man, later identified as defendant, wore a green iridescent jacket.

Six weeks later, on November 12, 1962, Mildred while at home, received a telephone call from a man. The caller asked her to have sexual intercourse with him and stated that he would be over in five minutes. He also stated that she would know him when she saw him. She accepted and told her brother and father. They surrounded the house.

Defendant did not appear. The next day, November 13, 1962, Mildred received another telephone call. The caller said no one was home when he went by the day before and again said that he would be over in five minutes. Mildred called the police. After this call, a man telephoned again, stated that he was Mr. Jackson and that he would meet her in front of St. Anselm's Church in fifteen minutes. She again called the police and a police trap was arranged. Mildred stood on the corner of 61st and Michigan in front of St. Anselm's Church. An unmarked police car with policemen inside dressed in civilian clothes was parked nearby. Defendant, in his auto, heading west on 61st Street, approached Mildred. She signaled to the police and defendant drove away. He turned left on Indiana Avenue, drove north to 56th Street, west on 56th Street, south through an alley and parked on 57th Street between Indiana and Michigan. The police followed and apprehended him as he walked rapidly from his car. He was brought to the Harris residence and identified by Mildred.

At the trial defendant testified that he was not the man who attempted the rape, that he did not know complainant; that on September 29, 1962, he was working at his place of employment taking a quarterly inventory until 5:30 P.M.; that on October 3, 1962, at the time of the alleged assault, he was at work; that on the date of his arrest he was driving south on Michigan, stopped at the corner of Michigan and 61st Street, and made a left turn; that at the corner he noticed a young woman and said "Good evening"; that he drove to 57th and Michigan, where he parked his automobile and was arrested. Most of defendant's testimony was corroborated by his plant manager and four company employees. Defendant's testimony as to the date of the assault was corroborated by testimony from a fellow employee and from the time cards of his place of employment.

Defendant's theory of the case is that he was not proved guilty of attempted rape beyond a reasonable doubt. Defendant contends that: one, the People failed to prove that defendant was the person

that committed the crime; two, that there was a complete lack of corroboration of the fact that there was an attempted rape; and three, that the findings of the trial court were not sustained by the evidence.

There is ample evidence that defendant was positively identified as the man who attempted to rape Mildred Harris. Defendant's denial and his alibi evidence presented an identification issue properly resolved by the trial judge. Mildred observed defendant on three separate occasions within close range. On each occasion she was close enough to identify defendant. The description given by her was an adequate description of defendant. She stated that he was short, brown skinned, nicely built, with a long head, a heavy mustache, closely shaved hair, and between 25 and 30 years of age. Mildred testified that she recognized defendant's voice over the telephone on all three occasions when he called. She also testified that the caller identified himself as Mr. Jackson on the last of the three calls.

Defendant claims that certain witnesses were not called by the People and suggests that their testimony would have contradicted that of complainant. Defendant's claim is invalid. The witnesses referred to were not shown to have relevant testimony on the identification issue. Further, they could only testify as to the victim's physical condition after the assault. The fact that an assault took place was not disputed in the trial court. Mildred's father testified that he arrived home, found his daughter with no clothes on and bleeding from the left side of her chest. He further testified that Mildred told him that she was raped. Any other evidence on the undisputed issue of the attempt to rape would merely strengthen this testimony.

We further conclude that the findings of the lower court were sustained by the evidence. The trial court found that defendant had a distinctive voice and thus inferred that Mildred could have identified the man over the telephone. The trial judge further found, after hearing

testimony regarding defendant's alibi defense, that he was at work on September 29 and October 3, 1962, that the time cards had been "doctored." There was a basis for such a finding from the evidence as the time on the time cards had been written in ink on these days and not punched by the time clock. The creditility of the witnesses was a matter for the determination of the trial judge. People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963); People v. Mack, 25 Ill.2d 416, 185 N.E.2d 154 (1962). The trial court also found that defendant fled from the police and the fact that he did flee was additional corroboration of the complainant's testimony. The trial court stated that defendant paid no attention to the siren and the flashing light on the police car. The trial court could have found that this action by defendant, prior to his arrest, amounted to flight and that the testimony of the alibi witnesses for defendant was unreliable.

Finally defendant contends that the court erred in limiting the cross-examination of the complainant. She testified on cross-examination as follows:

"Q. And when this man made the phone call from your hallway, and you were in the living room, where was Danny?

A. He was sitting on the couch.

Q. Did he see this man?

A. Yes, I guess so.

Q. Well, since September 2nd, 1962, did you ever ask Danny if he saw him?

A. Yes.

Q. Well, what did he say?

MR. TUITE: Objection.

THE COURT: I will sustain the objection."

The prosecutor's objection was apparently sustained by the court on the basis that it would constitute hearsay testimony. It is true, as defendant contends, that this answer would not violate the hear-

say rule in that it was not offered to prove the truth of the matter stated, but only to show acknowledgment, on the part of the complainant, of the subject matter of the statement. She had just testified, "I guess my brother saw the man," thereby implying that she had no knowledge whether or not her brother saw the man. The answer to the question propounded would rebut the inference of lack of any knowledge inherent in her statement "I guess . . . ."

We find, however, the act of the trial court in sustaining the objection did not prejudice defendant. Even if defense counsel was not given an indication whether or not the brother of the complainant had seen defendant, defense counsel could have obtained this information by the use of a subpoena.

We hold, therefore, that defendant was proven guilty beyond a reasonable doubt and that any error committed by the trial court was not prejudicial. We, therefore, affirm the judgment of the lower court.

JUDGMENT AFFIRMED.

BURKE, P.J., concurs

BRYANT, J., dissenting:

I am forced to dissent from the opinion of the majority in this case. I do not believe the appellant was proven guilty beyond a reasonable doubt.

It is the People's theory that the man who committed the attempted rape was the same man who was at the complaining witness' home the Saturday before the attempt took place--Saturday, September 29, 1962. Four men testified that the appellant was with them taking inventory that day. The time cards in evidence showed that on Saturday, September 29, 1962, the appellant worked from early in the morning until either 4:36 or 5:36 that afternoon. Apparently the card had been stamped 4:36 originally and later had been written over to read 5:36. The Court below seemed to consider this strong evidence to indicate that the card had

been altered to give the appellant an alibi. Mr. Ratchek, the appellant's employer, testified that he was the one who wrote over the card and said while he did not specifically remember why this was done, he believes that after the appellant punched out, it was discovered that something had been left uninventoried and this required them staying later.

We note that the complaining witness stated that the man who attacked her appeared at her apartment that Saturday between 2:00 and 4:00 in the afternoon. Even if the stamped time were the correct time, it would have been impossible for the appellant to have been at her house that afternoon.

The time card for Wednesday, October 3 shows the appellant began work at 7:00 in the morning and left work at 3:30 that afternoon. Both the check in and check out times were written in rather than stamped by a time clock on that date. This was explained by Mr. Ratchek who said that he was the one who wrote in the times:

> "...First of all, it happens to be the first day of the new work week when the time card would come out, and it would be very possible for the clerk, which has happened in the past, to overlook a man in making out the time cards, and by the time the office area actually opened up, the man would already have been at work about an hour and a half or so."

There was attempted an impeachment of Mr. Ratchek to the effect that he had told police officers he would sometimes write in the time on the company's punch cards if for some reason the employee had to leave the plant for personal reasons. It was never claimed that Mr. Ratchek said he did that in this case and Mr. Ratchek denies ever having said this at all. His testimony, taken with the testimony of three other men who remember being with the appellant the Saturday he was supposed to have been at the complaining witness' home, raises in my mind a reasonable doubt as to this man's being the assailant.

Bernard H. Lohan, a police officer for Park Ridge, Illinois, testified that he worked at the same plant as did the appellant at the

time he was supposed to have attacked this girl, and remembers working with the appellant during the taking of the inventory. The Court below pointed out that this witness first stated that the inventory was taken in the latter part of August, but I feel that by reading the record as a whole, it is established that the inventory was taken on September 29, and that this witness was simply confused as to the date. The point was never stressed in his examination. This witness stated that he was working with the appellant in the taking of the inventory from seven in the morning until 5:30 or 6:00 that evening. This testimony not only confirms the alibi of the appellant, but reinforces the testimony of Mr. Ratchek that appellant had worked until 5:36 that day. This witness said that the appellant was never outside his presence for more than 20 minutes.

Gerald Podgorski testified that he was working on inventory on September 29, 1962 from 7:00 in the morning until 5:00 or 6:00 that night. He stated that he remembered the appellant taking inventory that day. Another worker, Francis Beedon, Jr., testified he remembered the appellant working on the inventory the last Saturday in September, 1962, and that they worked until 5:00 or 6:00 in the evening. This witness said that the appellant could not have been gone for more than 10 minutes that day or he would have noticed it.

This Court has often said that in weighing the testimony of witnesses, we will not interfere with the trial court unless his conclusions are against the manifest weight of the evidence. I feel that this is such a case. These men have no motive to perjure themselves to protect the appellant. The complaining witness testified she was attacked by the man who was at her apartment Saturday, September 29, 1962. Even disregarding the time card for the date the attack took place, the evidence is overwhelming that the appellant could not have been at her apartment that Saturday.

The evidence shows that the appellant did not stop when the police car began following him November 13, 1962, but he claims he did not see the car and states he was going to visit his sister. He explains his roundabout route by pointing out that in this vicinity there are many one way streets so that it is necessary to do some doubling back to get to his sister's house. There was no testimony to contradict this. The complaining witness testified repeatedly that the man who attacked her was wearing an iridescent green jacket with a pattern. The appellant admits wearing a shiny green jacket but says that it has no pattern on it. There was no testimony to the contrary.

I feel that there is a strong doubt as to the identification of this man as the assailant. I vote to reverse the judgment of the Court below.

No. 65-3

(64 I.A.2 303)

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965

Abstract

JAY J. KEITH, Plaintiff-Appellee, vs. MARVIN EVERTS and HELEN D. EVERTS, Defendants-Appellants.	)	Appeal from the Circuit Court, Peoria County, Illinois.

CORYN, J.

On January 5, 1960, defendants, Marvin Everts and Helen Everts, husband and wife, entered a written agreement with Traders Realty Corporation, by plaintiff, Jay J. Keith, as its agent, authorizing it to solicit offers from the United States Post Office Department for the purchase or lease of a certain tract of land belonging to defendants and fronting on Glen Avenue in the City of Peoria. By this agreement defendants agreed to pay Traders Realty Corporation a commission of six per cent for a sale to the government, and, in the event of a build-lease arrangement, Traders Realty Corporation was to be paid a commission of five per cent of the gross rent for the first year, and three per cent of the gross rent for the balance of the term. Concurrently with this agency transaction, defendants executed an option agreement submitted to them by Traders Realty Corporation, granting the United States Post Office Department a right, exercisable by December 31, 1960, to purchase the aforedescribed tract for $35,000.00. This option was never exercised. On April 14, 1960, the government notified the parties here that it was thereby releasing its

option rights, that it intended to study its needs further, and that it would contact them later if it decided that defendants' property was adaptable to its needs. Thereafter, with the knowledge and cooperation of the defendants, the plaintiff showed defendants' property to several other prospective buyers or lessees. On February 28, 1962, after having negotiated directly with several of its representatives, defendants entered an agreement with the United States Post Office Department leasing the Glen Avenue tract, upon which they agreed to erect a building, for a term of twenty years at a gross annual rental of $18,300.00. On June 27, 1962, plaintiff, Jay J. Keith, as assignee of Traders Realty Corporation, filed a complaint in the Circuit Court for a commission due under the aforementioned listing contract. The complaint alleged that plaintiff, or his assignor, was the "procuring cause" of defendants' lease to the government, and demanded the sum of $11,346.00. On October 30, 1964, judgment was entered in favor of the plaintiff and against the defendants for the sum demanded. As the trier of facts, the court made findings in its judgment order as follows: (1) that plaintiff effected the initial contact between defendants and the ultimate lessee; (2) that from the time of this initial contact the government never terminated its interest in defendants' property; (3) that defendants never terminated plaintiff's agency (or the agency of his assignor); (4) that plaintiff (and his assignor) never abandoned efforts to induce the government to take defendants' property; (5) and that defendants refused to cooperate with the plaintiff (and his assignor) as their agent. Defendants have perfected this appeal from that judgment.

In support of their prayer for reversal, defendants rely chiefly upon the case of Mammen v. Snodgrass, 13 Ill. App. 2d 538, to sustain their argument that the judgment of the trial court is contrary to the manifest weight of the evidence and the law. They argue that neither plaintiff nor his assignor were the procuring cause of the lease, their agency having been terminated or abandoned prior to the negotiation and execution of the lease, and that the

lease was procured solely through their own efforts. Plaintiff contends that all questions of whether the written contract of employment was abandoned or otherwise terminated, as well as questions of who procured the lease, involve issues of fact, and that the trial court's findings on these matters cannot be disturbed where they are not palpably erroneous. Plaintiff relies upon the case of Chiagouris v. Continental Trailways, 50 Ill. App. 2d 196, to sustain his argument that the judgment of the trial court is correct.

In Mammen v. Snodgrass, supra, the undisputed evidence clearly demonstrated that the plaintiff broker had abandoned the project. Before leaving on an extended tour of California and Washington, he advised an undisclosed prospect with whom he had previously negotiated unsuccessfully in regard to defendant's land, that if he were yet interested in defendant's farm, he should deal with defendant directly. The broker made no further efforts to sell the farm. Having invited the direct dealing between the prospect and owner, the owner's conduct in subsequently concluding a transaction with the prospect was not in bad faith toward the broker, who, accordingly, was held not the procuring cause of the sale, and therefore not entitled to a commission. In the case at bar, the evidence relating to the issue of abandonment is conflicting. Although defendants testified that plaintiff did nothing after the year 1960 to sell or lease their land, plaintiff testified to continuous activity all through 1961, and until the execution of the lease involved here. The trial judge, who was in a superior position to determine matters of credibility, accepted plaintiff 's evidence as the accurate version of what transpired, and nothing in this record suggests that this election was in error. "Although the testimony of the parties is the same as to some points, it varies as to crucial factual matters at issue. The trial judge believed the testimony of the plaintiff, and unless such a decision was clearly contrary to the manifest weight of the evidence or was palpably and manifestly erroneous, we will be required to use the facts so elicted as the basis for our inquiry into the conclusions of

law reached by the trial court." Chiagouris v. Continental Trailways, 50 Ill. App. 2d 196, 198.

The evidence relating to the issue of whether plaintiff's agency was terminated by defendants prior to the negotiation and execution of the lease is also in dispute. Marvin Everts testified that he talked with plaintiff by telephone in September, 1960, and told plaintiff that he and his wife did not want him or Traders Realty Corporation to represent them any longer. Plaintiff denied any such communication and testified that he was in Europe from August through November, 1960. Again, the trial court accepted plaintiff's version.

Defendants further argue that irrespective of the issues of abandonment and termination of agency, the record shows that the lease would never have been consummated had the matter been left to plaintiff, and that plaintiff was not the procuring cause of the lease in any event, it having been procured solely by defendants own efforts. On this point the record shows that the plaintiff originally informed defendants of the possibility of a sale or lease to the Post Office Department, and supplied defendants with the pertinent information, advise, and assistance in submitting a bid for such sale or lease. After the original bid to the Post Office Department was rejected on April 14, 1960, the plaintiff continued his efforts to sell or lease defendants' premises. When the Post Office Department advertised for lease bids in the Peoria Journal Star on March 8, 1961, the plaintiff, on March 10, 1961, wrote to Harold Lock, the Department's local real estate officer, with whom he had had continuous contact in respect to defendants' land, submitting two tracts, one being defendants', and inquired about the Department's preference of the two for the purpose of bids. He then advised defendants by letter that he had done this. At about the same time, defendants contacted Lock and thereafter negotiated directly with the Post Office Department for the lease. The defendants did not

inform the plaintiff of this direct negotiation. Plaintiff had no further involvement in these negotiations as he had received a letter of reply from Lock on March 15, 1961, stating that he was informed that plaintiff was not the agent for the owners of the tracts listed in the letter of March 10, 1961, and that no opinion regarding preference would therefore be given. Defendants, in their testimony about the matter, took the position that they were free to negotiate directly, and without plaintiff's agency, because of the alleged abandonment and termination of said agency.

On the basis of the evidence in the record, we would not be justified in concluding that the findings of the Circuit Court of Peoria County were contrary either to the law or the manifest weight of the evidence. Accordingly, the judgment of the Circuit Court of Peoria County is affirmed.

Affirmed.

Alloy, P. J. and Stouder, J. concur.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

64 I.A.2 319

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE EDWARD C. EBERSPACHER, Presiding Judge

HONORABLE JOSEPH H. GOLDENHERSH, Judge

HONORABLE GEORGE J. MORAN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 17th day of November A. D. 19 65, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

Abstra

64 I.A.2 319

FILED

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General Nos. 10616 and 10628 Consolidated

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee

vs.

MERLE HORNSTEIN and MARVIN HORNSTEIN,

Defendants-Appellants

Appeal from
Circuit Court
Sangamon County

GOLDENHERSH, J.

Defendants, Merle Hornstein and Marvin Hornstein, appeal from the judgment of the Circuit Court of Sangamon County, entered on a jury verdict finding defendants guilty as charged in a five count indictment predicated upon Sections 28-1 and 28-3 of the Criminal Code. The counts upon which defendants were tried are summarized in an earlier opinion of this court wherein a prior conviction was reversed and the cause remanded. People v. Hornstein, 47 Ill. App. 2d 367, 198 N.E. 2d 207. In accordance with the rule enunciated in People v. Duszkewycz, 27 Ill. 2d 257, 189 N.E. 2d 299, the trial court entered judgment and imposed sentence on Count II, which charged defendants with knowingly permitting certain premises therein described to be used as a place of gambling, and further charged both defendants with being second

offenders, setting out an alleged prior conviction of each defendant for violations of the gambling laws of Illinois.

Although the appeal is before us on a single record and abstract, defendants are represented by separate counsel, and have filed separate briefs. The errors charged, and the contentions of the parties with regard thereto, will be hereafter enumerated and discussed to the extent necessary to this opinion.

Defendants contend that the evidence fails to prove them guilty beyond a reasonable doubt as to the offense charged, and fails to prove beyond a reasonable doubt that they are the same individuals shown to have been previously convicted of violations of Section 28-3 of the Criminal Code. The determination of these issues requires a review of the evidence.

William Marcuzzo, called by the People, testified that he was an agent with the Criminal Section of the Illinois State Police. On February 1, 1963, he and two other men, Mike Clark and John Piggott, went to the M & M Pool Hall in Springfield. Mike Clark, one of the men with Marcuzzo, spoke to one, Carl, an employee at the M & M Pool Hall, and shortly thereafter defendant Merle Hornstein appeared. Clark asked Merle whether they could be admitted to 411 1/2 East Washington Street in Springfield to shoot craps. Marcuzzo, Clark,

defendant Merle Hornstein and Piggott went up a flight of stairs at 411 1/2 East Washington Street where they were confronted with a gray metal door, equipped with a two-way mirror and a buzzer. Defendant Merle Hornstein pushed the buzzer and the group was permitted to enter. Merle asked Marcuzzo if he wanted to play poker. He declined and Merle asked him if he wanted to shoot craps. He described the poker table, the dice table, and the rooms in which they were situated. Shortly after the four men entered the room where the dice table was located Merle left momentarily, and returned with a croupier stick. Two other men entered the room and the dice game was started. Marcuzzo rolled the dice and Merle retrieved the dice with the croupier stick, and moved half of a billiard ball onto numbered cards on the table to mark the shooter's "point". Another man, not further identified, handled the money, paying out winnings and collecting losses. Marcuzzo was there for about two hours, and during a part of that time defendant Marvin Hornstein wielded the croupier stick and moved the billiard ball to mark the numbers. Marcuzzo pointed out both defendants.

Marcuzzo stated that shortly after being admitted to the premises, defendant Merle Hornstein told him that if he wanted anything to eat or drink, to tell one of two girls, whom the witness identified as Pat Thomason and Rosemary Frye.

He also had a conversation with Merle Hornstein about playing blackjack. When he left the premises Merle suggested that he come back sometime. As he left he saw Merle standing at the dice table counting money. He was not sure whether Marvin was present at that time.

On February 9, 1963 Marcuzzo returned to the M & M Pool Hall. He talked with defendant Marvin Hornstein, told him he would like to shoot craps, whereupon Marvin told him the heat was on, the game was down, would probably be down for about two weeks, and would probably be moved to a new location.

On February 15, 1963 Marcuzzo again went to the M & M Pool Hall. Both defendants were there. Marcuzzo told them he would like to shoot craps and Merle told him the game was down. He left, and returned about 45 minutes later with Captain Hall of the Illinois State Police, and the Sheriff of Sangamon County. The Sheriff told Merle they had a search warrant and Merle told him they could inspect the premises. They went to 411 1/2 East Washington, Merle unlocked the door, and Marcuzzo, the Sheriff, Captain Hall, and both defendants entered. The witness then identified various exhibits and identified a Miss Priscilla Thomason and John Piggott.

Priscilla Ann Thomason, called by the People, testified that she knew both defendants, that she had gone to

411 1/2 East Washington with her girl friend Pat Dooley, who was a blackjack dealer for Sam Greco, that between October, 1962 and January, 1963 she was in 411 1/2 East Washington every night except for the last week in December and the first week in January, that she enjoyed herself there, that both defendants were usually present when she went there, that she saw Marcuzzo the night he was there, that defendant Merle Hornstein sometimes gave her money to buy "cokes" and food for persons present there, that she sometimes served "customers" drinks from a refrigerator on the premises, that she usually left with defendant Merle Hornstein, that she had observed both defendants playing poker, that she had seen the People's Exhibits at 411 1/2 East Washington, that she had seen both defendants at a blackjack table but did not know what they were doing there, that she had seen a rack of silver dollars, cards and a box on the blackjack table, that Al Cooper had the keys to the premises, that Sam Greco counted the money from the blackjack game, she had seen Mike Clark there with Marcuzzo, that on occasion she answered the door and would ask "Merle or Pete or Sam Greco" if it was alright to admit the people. In response to the question, "But you would call Merle Hornstein or Marvin Hornstein or Same Greco?", she replied, "Yes,sir".

At the request of the People, and over defendants' objection, she was called as the Court's witness and was

interrogated as to certain testimony given at the first trial of this case. She was asked if she had stated that Merle, Pete and Sam had keys, and stated that if the record showed she said it, she must have said so.

On cross examination, she stated she had seen Merle playing at the blackjack table, but had never seen Marvin play dice or cards, she had never seen either defendant give orders, she had seen Al Cooper and Sam Greco operate the dice game, but had not seen either defendant do so.

James Christensen, Sheriff of Sangamon County, testified that he accompanied Marcuzzo and others to the M & M Pool Hall on February 15, 1963, that he saw both defendants there, that Captain Hall spoke to defendant Merle Hornstein, and that Merle unlocked the doors at 411 1/2 East Washington. He identified the People's Exhibits, being the front door at 411 1/2, the billiard table and a poker table, as having been removed from 411 1/2 East Washington.

Sergeant Albert J. Bertagnolli of the State Police testified that he was present on February 15, 1963, that both defendants were there, that defendant Merle Hornstein unlocked the door at 411 1/2 East Washington, that they searched the premises, found and removed the People's Exhibits, that no gambling was in progress at the premises at that time.

Captain William Hall of the State Police testified that he saw the defendants on the night of February 15, 1963 in the M & M Pool Hall, he told them he had a warrant to search the premises at 411 1/2 East Washington, that if they were not admitted to make the search it would be necessary to break in; defendant Merle Hornstein unlocked the door, and the witness and others with him entered the premises. He identified the People's Exhibits as having been found at, and removed from, the premises.

After careful consideration of the record we hold that the evidence fails to prove defendant Marvin Hornstein guilty beyond a reasonable doubt. Section 28-3 provides that a person who knowingly permits gambling in premises owned, occupied or controlled by him, is guilty of an offense. The evidence fails to show that this defendant owned, occupied or controlled the premises in question. The People rely upon People v. Brickey, 332 Ill. App. 370 and Robbins v. The People, 95 Ill. 175, as authority that the evidence here is sufficient to sustain the conviction, but an examination of the opinions in those cases reveals clearly distinguishable fact situations. In Brickey, a witness testified that he had seen the defendant sell dice, "cut the game", "run the box", and "use the rake". He also testified that the defendant had told him he would see that he was reimbursed for his losses.

In Robbins, a witness testified he had seen the defendant dealing cards, and when disputes arose during the game, defendant settled them.

In the case at bar, the most that the evidence will support is that defendant Marvin Hornstein used the croupier stick briefly during Merle's absence, and assuming, although there is no testimony to that effect, that Marvin and Pete are one and the same person, that on occasion Miss Thomason asked him whether certain individuals could be admitted to the premises. This court has the duty to examine the evidence to determine whether guilt has been established beyond a reasonable doubt, and since we cannot say that no reasonable doubt of defendant Marvin Hornstein's guilt remains, or that every reasonable hypothesis inconsistent with innocence is excluded, the judgment as to this defendant must be reversed. The People v. Butler, 28 Ill. 2d 38, 190 N.E. 2d 800. In view of the conclusion reached we need not consider the other contentions of this defendant.

As to the defendant Merle Hornstein, the evidence is sufficient to sustain the conviction of the offense allegedly committed on February 1, 1963. People v. Brickey, 332 Ill. App. 370. There remain for consideration other errors relied upon by this defendant.

Defendant charges that he was entrapped by the People's witness, Marcuzzo, and under the provisions of Section 7-12 of the Criminal Code is not guilty of the offense charged. This contention is without merit since the evidence shows conclusively that the officer did no more than to afford him an opportunity to commit an offense he was ready and willing to commit. People v. Clay, 32 Ill. 2d 608, 210 N.E. 2d 221.

Defendant contends that the People failed to prove beyond a reasonable doubt that he is the same individual who on October 25, 1961 was convicted of an offense committed on October 19, 1961. Failure to establish this fact was the basis for the reversal of the earlier conviction in this case. People v. Hornstein, 47 Ill. App. 2d 367, 198 N.E. 2d 207.

The record shows that the People offered, and the Court admitted, an exhibit described as "the common law record" of the conviction of defendant Merle Hornstein, of the offense of permitting premises described as 413 East Washington Street in Springfield to be used or occupied for the purpose of illegal gambling.

The People called Robert Goby, who testified that he was an investigator for the office of the State's Attorney of Sangamon County and had been so employed for 6 years. He stated he had known the defendant Merle Hornstein "for quite a while". He was asked to examine the exhibit and was then asked,

"Mr. Goby, is the defendant, Merle Hornstein, the same person that is named in People's Exhibit No. 9, if you know?" He replied, "I only know one Merle Hornstein". After objection and considerable colloquy between counsel the question was repeated and the witness said, "Well, that court record named Merle Hornstein, and this is the Merle Hornstein I know". After objection and more exchanges between counsel, he was asked, "Is the defendant, Merle Hornstein, the same person named in Exhibit 9?" He answered, "As far as I know, he is, Mr. Hollis." The court sustained an objection to this answer but no ruling was made on defendant's motion that the answer be stricken. The witness was asked again, "Is the defendant, Merle Hornstein, the same person named in People's Exhibit No. 9?" and he answered, "To the best of my knowledge, he is."

Our Supreme Court has stated clearly, unequivocally and repeatedly, that the fact of establishing the identity of the defendant with the former conviction must be proved with the same certainty which the law requires as to the substantive offense. People v. Casey, 399 Ill. 374, 77 N.E. 2d 812; People v. Stewart, 23 Ill. 2d 161, 177 N.E. 2d 237. If this were a matter of identification of the defendant to prove the substantive offense, the identification by one witness would not suffice unless it were positive. The People v. Pride, 16 Ill. 2d 82, The People v. Soldat, 32 Ill. 2d 478, 207 N.E. 2d 449. The testimony of Goby does not meet the requirement that

such identification be positive, and even aided by the statutory provision that the record is prima facie evidence of the former conviction, the evidence falls short of the requisite proof beyond a reasonable doubt. As stated in the prior opinion in this case, we perceive of no reason why the required proof was not forthcoming.

Having determined that the evidence sustains the conviction for the offense committed on February 1, 1963, and that it does not sustain the judgment finding defendant guilty as a second offender, we apply the provisions of Section 121-9 (b) of the Code of Criminal Procedure and reverse the conviction of the defendant Merle Hornstein as a second offender and remand the case to the Circuit Court of Sangamon County, with directions to enter judgment of guilty, and for further proceedings within the purview of the Criminal Code as applicable to a conviction for a first offense under Section 28-3.

Judgment reversed as to defendant Marvin Hornstein.

Judgment reversed and remanded with directions as to defendant Merle Hornstein.

EBERSPACHER, P.J. and MORAN, J. concur.

50115

WESTLAKE FINANCE COMPANY, a corporation,

Plaintiff-Appellant,

v.

ALEX C. MONTGOMERY, AJAX SERVICE STATION, AJAX STORAGE GARAGE and JOHN DOE,

Defendants-Appellees.

64 I.A.2 347

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order entered August 3, 1964 in the Circuit Court of Cook County. The parties to this appeal have entered into a stipulation of facts which we now set out in full.

"On or about May 25, 1963, one Alex C. Montgomery purchased a 1958 Mercury two door hardtop automobile from Chicago-Homan Motors, Inc. The purchase price was $800.00. To this was added $472.80 to cover collision insurance and finance charges, making a total of $1272.80. Montgomery made a down payment of $200.00 in cash, and the balance was to be paid in eighteen monthly installments of $59.60 each. Montgomery signed a Retail Installment Contract covering the purchase, and this contract was assigned to Plaintiff, Westlake Finance Company.

"Title to the car was issued to Montgomery by the Secretary of State of Illinois on June 13, 1963, the Certificate of Title showing a lien in favor of said Westlake Finance Company. Montgomery made the first payment on the contract.

"Early in July, 1963, Montgomery, who had possession of the car, brought it to Ajax Garages, the defendant, for repairs to the engine and transmission. The repairs were completed on or about July 15, 1963. Montgomery was notified to pick up the car and was given a bill for the repairs in the amount of $322.31. Montgomery was also informed that Ajax Garages would retain the car until the bill was paid, and that there would be a storage charge of $1.00 per day. Montgomery made repeated promises to pay the bill and pick up the car. This he failed to do, and

the car remained in the possession of defendant, Ajax Garages.

"Montgomery made no further payments to Westlake Finance Company, under the Retail Installment Contract, and there remained due a balance of $1016.75. Plaintiff filed a replevin suit on or about December 6, 1963, and pursuant to the writ of replevin the car, then in the possession of Ajax Garages, was seized by the Bailiff of the Municipal Court of Chicago and delivered to plaintiff. The car was subsequently sold by plaintiff to a third party.

"At the time of the seizure, by the Bailiff, there was due and owing to the defendant Ajax Garages the sum of $482.31, $150.00 for storage and $322.31 for repairs. The plaintiff, Westlake Finance Company and the defendant, Ajax Garages agreed that these charges were fair and reasonable."

The basic claim of the appellant in this appeal is that under Illinois law, the reservation of title in a conditional sales contract creates a lien superior to a subsequent artisan's lien. In support of this proposition, the appellant urges Chapter 82, sec. 40, 43, Ill. Rev. Stat., 1963. Sec. 40 provides for the creation of an artisan's lien where a person, firm or corporation has expended labor, skill or materials on a chattel. Sec 43 provided:

> "The lien created by this Act shall be subject to the lien of any bona fide chattel mortgage upon the same chattel recorded prior to the commencement of any lien herein created, but said lien herein created shall be in addition to, and shall not exclude, any lien now existing at common law, and any lien existing by virtue of 'An Act concerning liens for labor, services, skill, or materials expended upon chattels,' enacted by the sixty-second general assembly."

One thing which must be taken note of immediately is that the appellant in this cause did not hold a chattel mortgage on the automobile in question. The appellant was a conditional vendor and was not protected by the express provisions of sec. 43. Appellant's reliance on this section would, therefore, seem to be misplaced.

Decisions construing sec. 40 of the Act, however, have held

that the holder in due course of a conditional sales contract has a lien superior to that of a garage owner for repairing and storing the automobile. Such was the holding in the recent case of General Motors Acceptance Corp. v. Allen, 52 Ill. App.2d 114, 201 N.E.2d 747 (1964) and cases there cited. What appellant fails to note in its brief, however, is that these cases decided the law as it was prior to the passage of the Uniform Commercial Code which went into effect in this State July 1, 1962--before any of the acts giving rise to the dispute occurred. Sec. 9-310 of the Code states:

> "When a person in the ordinary course of his business furnished services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise."

This section clearly gives a superior lien to the defendant appellee. Ajax Garages furnished materials and services in the ordinary course of business, and the automobile was in its possession when this action was instituted. While the Code specifically gives the State Legislature the option to change the priority of liens set forth in this section, the Legislature of this State did not do so until earlier this year when it redrafted Chapter 82, sec. 43 to read:

> "The lien created by this Act shall be subject to the lien of any bona fide security interest as defined in the Uniform Commercial Code upon the same chattel recorded prior to the commencing of any lien herein created, but the lien herein created shall be in addition to, and not exclude, any lien now existing at common law, and any lien existing by virtue of 'An Act concerning liens for labor, services, skill or materials expended upon chattels.'"

That section went into effect July 1, 1965. It can have no application to the case at bar.

The appellant urges on appeal that it perfected its lien by having it recorded on the certificate of title as required by the Illinois Motor Vehicle Law. Chapter 95 1/2, sec. 3-202 Ill. Rev. Stat., (1963). This section, of course, deals with the perfecting of security

interest, and is not controlling on the question of which liens are superior to others. The appellant has also cited many cases which were decided on the law prior to the Code. They are not applicable to the case at bar.

At the time the sale of the automobile was made and at the time this cause was tried, the Uniform Commercial Code controlled the matter and the Legislature had not yet acted to make any changes in the priorities set forth in sec. 9-310 of the Code. The Court below correctly decided that the lien of Ajax Garages was superior to the lien of Westlake Finance Company. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

49892

ALFRED TABRON,	)	64 I.A.2 367
Plaintiff-Appellee,	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
ROY W. PLEASANT, et al.,	)	COOK COUNTY.
Defendants-Appellants.	)	

MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

Defendant Agnes Daniels has appealed from a judgment for $1100 entered against her on plaintiff's complaint for libel. Plaintiff has failed to comply with Rule 5 (m) of this court, in that he has filed no brief and the time for filing same has long since expired. In this circumstance it is unnecessary for us fully to discuss the case in the light it appears from a study of defendant's brief and abstract. We are warranted in reversing the judgment without further consideration. 541 Briar Place Corp. v. Harman, 46 Ill. App. 2d 1; Ogradney v. Daley, ___ Ill. App. 2d ___, 208 N.E. 2d 323; Wright v. Chicago Transit Authority, 43 Ill. App. 2d 408; C.I.T. Corp. v. Blackwell, 281 Ill. App. 504.

Moreover, review of the record and arguments presented to us, though ex parte, prompts us to conclude that plaintiff's failure to contest the appeal is tantamount to confession of error. 541 Briar Place Corp. v. Harman, 46 Ill. App. 2d 1.

The judgment of the Circuit Court as to defendant Agnes Daniels is reversed with judgment here in her favor.

REVERSED.

McCORMICK, P.J., and DRUCKER, J., concur.

Publish Abstract Only.

49848

CHARLES LANTRY, Trustee under Trust Agreement dated June 1, 1960 and known as Trust No. BLW-1,

Plaintiff-Appellant,

v.

VILLAGE OF HOMEWOOD, a municipal corporation,

Defendant-Appellee.

64 I.A.2 428

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is a zoning case in which plaintiff takes an appeal from a judgment dismissing plaintiff's complaint which asked for declarations that a zoning classification be declared void, and that the action of defendant's Board of Trustees, in denying a variation, was arbitrary and capricious.

Plaintiff seeks to erect a medical center on the property involved, which is located at the southwest corner of the intersection of Dixie Highway and Heather Street in the Village of Homewood. It measures approximately 321 feet from north to south and 213 feet from east to west, and contains approximately 68,373 square feet. On the northern portion of the property is a single family frame residence approximately 50 years old. On the southern portion is a dwelling approximately 12 years old. The balance of the property is unimproved.

Dixie Highway is a heavily traveled arterial thoroughfare characterized by heavy and fast moving traffic of both a local and regional character. The subject property is classified under the zoning ordinance of Homewood as R-2 (Single Family Residence), which permits only single family homes and related public uses, such as schools and playgrounds. This zoning classification extends south to the center of the block. The south half of the block is classified as B-3 (Service Business). No apparent break exists between the R-2 and B-3 zoning districts on the west side of Dixie Highway as 186th Street does not run west of Dixie Highway. Within the B-3 area immediately south of the

subject property and north of 187th Street on the west side of Dixie Highway, are located, from north to south, the following uses: a medical building, 3 residences, an office structure, a thrift shop, a Christian Science office, a dentist's office, a doctor's office, a bakery, a beauty shop, a men's wear shop, a meat market and a gas station with auxiliary parking facilities. Across the street from the subject property on the east side of the street and north of 186th Street are located a doctor's office and a church; south of the last described property and south of 186th Street are located a drug store, a real estate office, a restaurant, a hardware store, barber shop, children's apparel shop, a delicatessen and a dime store. Immediately south of the last described property and south of 187th Street are located an apparel shop, a camera shop, a liquor store, a hobby shop, and an electrical appliance store and grocery store.

Thus, all the properties described above on the west side of Dixie Highway south of 186th Street (if extended westward) are zoned under the Homewood Zoning Ordinance as B-3 (Service Business) and those north of 186th Street (if extended westward) are zoned R-2 (Single Family residence). All properties described above, on the east side of Dixie Highway between 186th Street and Terrace Road, are zoned B-2 (Community Business). Single family residences, however, exist both east and west of Dixie Highway.

The Zoning Ordinance of Homewood contains provisions for two types of variation. The first, which is the one involved here, is the Zoning Variation, generally referred to as a "Use Variation," by which a use can be permitted in a district where the classification would otherwise exclude it. An example of such variation is the medical center which is located in a single-family residence district immediately south of and adjacent to the subject property. Where such a variation is utilized, a hearing is required by the Zoning Board of Appeals, which then recommends allowance or disallowance to the Village Board of Trustees,

which in turn has the ultimate power to grant or deny the variation. This method was used by plaintiff in his effort to obtain a variation to construct the proposed medical center.

On September 26, 1962 plaintiff filed with the Homewood Zoning Board of Appeals a petition seeking a variation of the zoning ordinance as applicable to the subject property, so as to permit erection and operation of a Medical Center. The proposed Medical Center would cover approximately 8500 square feet, or 12% of the land area. The structure would be one story in height, of brick and glass construction and fully air conditioned. It is designed for use by 8 to 12 doctors and would contain suites with treatment rooms, reception areas, laboratories, lavatories and storage space. Parking would be provided in accordance with Village Ordinance requirements.

The Zoning Board of Appeals conducted hearings on the petition on November 14, 1962 and November 29, 1962, and recommended that the variation as proposed be granted, subject to certain conditions not pertinent to this opinion, by a vote of four to two. On December 11, 1962, the Homewood Village Board of Trustees disapproved the recommendation of the Zoning Board of Appeals and denied the variation petition by a vote of six to one.

Plaintiff filed a two count complaint for declaratory judgment. Count One prays for an order declaring the residential classification of the subject property void on constitutional and statutory grounds insofar as it prevents the erection of a medical center on the subject property. Count Two, in the alternative, prays for a declaration that the Village Board of Trustees failed to comply with the applicable state statutes and village ordinances in not granting a variation of the zoning ordinance to permit erection of a medical center, as recommended in the report of the Zoning Board of Appeals.

At the trial, plaintiff's expert witnesses were a City Planner and two Appraisers. The City Planner testified that the proposed use

as a medical center was the highest and best use of the property, that the use, if allowed, would have no detrimental impact upon the adjacent properties, but as proposed would have a beneficial effect on the adjacent properties, and that the allowance of the use as recommended by the Zoning Board of Appeals, would be consistent with good city planning.

The Appraisers testified that as presently zoned the land alone was worth between $24,000 and $29,000, but that if the proposed medical center was allowed the property would be worth approximately $52,000 to $56,000. These witnesses also testified that the proposed use would have no detrimental impact upon the adjacent properties, but rather would have a stabilizing and beneficial effect.

Defendant introduced as a witness a member of the Homewood Police Force, who testified that traffic problems might result if the proposed use was permitted. Also testifying for defendant was the Building Commissioner and two residents, living in the immediate area, who opposed the proposed use.

Expert witnesses for defendant were likewise a City Planner and an Appraiser. The City Planner testified that in his opinion the proposed use was not consistent with the public welfare, was inconsistent with long-range planning goals of the Village and would have a detrimental effect on the adjacent residential properties. On cross-examination, however, he admitted that the medical center building, adjacent to the proposed medical center, would have a detrimental effect on the subject property, if said subject property was developed for residential purposes.

Defendant's Appraiser witness testified to values, as presently zoned and as zoned so as to permit the proposed use. He testified that in his opinion the proposed use would have a depreciating effect on properties immediately adjacent to and across from the subject

property, but conceded that the medical use immediately to the south had an impact on the subject property insofar as the suitability of the subject property for single family development was concerned.

The judgment entered by the trial court in favor of defendant dismissing the complaint is based on eight findings of fact, to-wit:

1. The property in question is located on the southwest corner of Dixie Highway and Heather Road in the Village of Homewood, Cook County, Illinois; it measures 321 feet on Dixie Highway and 213 on Heather Road; and it is presently improved with two frame single-family dwellings.

2. Since 1929, the effective date of the Village's initial Zone Ordinance, the property in question has been zoned for single-family residences.

3. The property could be subdivided, under present Village requirements, into five or six residential lots.

4. The plaintiff purchased the property in 1960 and was aware at that time that the applicable zoning was for single-family residences.

5. There was no evidence, other than the U. S. Documentary (Revenue) Stamps affixed to the two Deeds in Trust, concerning the purchase price paid by the plaintiff for the property.

6. The character of the neighborhood in which this property is located is residential.

7. The plaintiff's proposed use of the subject property is for a medical clinic designed for 8 to 12 doctors' suites, with parking facilities for approximately 90 vehicles.

8. The plaintiff has not established that the action of the defendant herein complained of has been arbitrary, capricious, confiscatory or discriminatory and the court does further find and declare that the Zoning Ordinance of the Village of Homewood is, as applied to the plaintiff herein and the subject property, in all respects valid and lawful.

Plaintiff's theory of the case is that the subject property is characterized by adjacent uses, particularly the medical centers previously erected pursuant to variations granted in the single-family residence districts located in the immediate vicinity of the subject property; that the limitations imposed upon the subject property, insofar as they prohibit the construction of a medical center, are not in furtherance of the public health, safety, morals, comfort and general welfare of the community and are therefore void; and in the alternative,

that the variations as sought by plaintiff should be granted by the Village Board of Trustees in that their action in refusing to grant such variations was arbitrary and capricious.

Defendant's theory of the case is that the zoning ordinance prohibiting plaintiff's proposed commercial use is valid and reasonable and that plaintiff failed to demonstrate by affirmative evidence that the action by the Village in failing to grant the variation, was arbitrary or capricious.

At the outset we must dispose of defendant's contention that plaintiff's efforts to obtain a variation does not satisfy the requirement that he exhaust his local remedies before seeking judicial relief. Bright v. City of Evanston, 10 Ill.2d 178, 139 N.E.2d 270 (1956). Defendant asserts that plaintiff must again go back to the Board of Trustees of the municipality and request an amendment to the ordinance with a hearing before the same Zoning Board of Appeals and ultimate allowance or disallowance by the same Board of Trustees. The trial court rejected this contention and we affirm that position.

The basic Illinois case setting forth the exhaustion of remedy doctrine, was Bright v. City of Evanston, supra. In that case the plaintiff proposed the erection of an apartment structure in a Single-Family Residence District. The Zoning Ordinance of Evanston permitted use variations. As in the present case, the Zoning Board of Appeals was the hearing body, having only advisory jurisdiction with the final power to grant or deny the variation in the corporate authority. There, as here, an amendment to the Ordinance was an alternative method of relief. The Supreme Court held, however, that until the plaintiff availed himself of the use variation method, his efforts at judicial relief were premature. The court stated at page 186:

> In the case at bar the zoning ordinance has made provision for variation in particular cases by application to the board of appeals, which is empowered to make recommendations to the city council with respect thereto. The plaintiff has not seen fit to apply for such a variation. He does not complain of the zoning ordinance as a whole, but claims only that the classification of his lot for residential rather than commercial uses infringes his

> constitutional rights. Under such circumstances he should apply in the first instance to the board of appeals, and if unsuccessful there he can seek judicial relief. His action for declaratory judgment without first exhausting his administrative remedies will not lie.

There the variation application was deemed an administrative remedy even though ultimate allowance was within the province of the legislative body. The same doctrine was recognized in Bank of Lyons v. County of Cook, 13 Ill.2d 493, 150 N.E.2d 97 (1958), where failure to seek a use variation precluded judicial relief, notwithstanding the alternate available remedy of amendment.

The foregoing cases established the Supreme Court's precept that no justiciable controversy arises until the applicant has sought and been denied relief on the local level more than once. Subsequently, however, the court stated in Herman v. Village of Hillside, 15 Ill.2d 396, 155 N.E.2d 47 (1958), at page 408:

> . . . Plaintiff filed an application for amendment of the zoning ordinance requesting reclassification, public hearing was had before the board of appeals and the corporate authorities adopted a resolution refusing to amend. The same board of appeals would have had jurisdiction over a variation, and it is unreasonable to assume that it would reverse itself and grant practically the same relief. To insist on the additional useless step would merely give lip service to a technicality and thereby increase costs and delay the administration of justice, which is the very thing we are trying to avoid. The action here taken was a reasonable equivalent within the meaning and spirit of the cases above cited.

Thus we conclude plaintiff has fully satisfied the doctrine requiring resort to local remedies by seeking a method of relief provided in the Zoning Ordinance. See Wiercioch v. Village of Niles, 27 Ill.2d 363, 189 N.E.2d 278 (1963), and Van Laten v. City of Chicago, 28 Ill.2d 157, 190 N.E.2d 717 (1963).

Plaintiff's first contention is that the zoning classification of the subject site as a single-family residence district is unreasonable and void insofar as it prevents the erection and operation of a medical center. The Circuit Court has the power to adjudge a zoning classification void insofar as it prohibits a proposed use. Sinclair Pipe Line v.

Village of Richton Park, 19 Ill.2d 370, 167 N.E.2d 406 (1960). We proceed with an examination of the evidence. The basic guide lines for determining the validity of a zoning ordinance have frequently been set forth. In LaSalle National Bank v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65 (1957) the court stated at page 46:

> Even though the validity of each zoning ordinance must be determined on its own facts and circumstances (Galt v. County of Cook, 405 Ill. 396; People ex rel Alco Deree Co. v. City of Chicago, 2 Ill. 2d 350) yet an examination of numerous cases discloses that among the facts which may be taken into consideration in determining validity of an ordinance are the following: (1) The existing uses and zoning of nearby property, (Krom v. City of Elmhurst, 8 Ill. 2d 104; Forbes v. Hubbard, 348 Ill. 166; Langguth v. Village of Mount Prospect, 5 Ill. 2d 49), (2) the extent to which property values are diminished by the particular zoning restrictions, (Midland Electric Coal Corp. v. County of Knox, 1 Ill. 2d 200, 214; Offner Electronics, Inc. v. Gerhardt, 398 Ill. 265; People ex rel. Kirby v. City of Rockford, 363 Ill. 531; Ehrlich v. Village of Wilmette, 361 Ill. 213), (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public, (Chicago Title and Trust Co. v. Village of Franklin Park, 4 Ill. 2d 304, 306; Krom v. City of Elmhurst, 8 Ill. 2d 104, 115; Evanston Best & Co. v. Goodman, 369 Ill. 207), (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner, (Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 36), (5) the suitability of the subject property for the zoned purposes (in this cause residences on 10,000 square feet), (Langguth v. Village of Mount Prospect, 5 Ill. 2d 49, 54; Petropoulos v. City of Chicago, 5 Ill. 2d 270, 274), and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property. Krom v. City of Elmhurst, 8 Ill. 2d 104, 111-113; Chicago Title & Trust Co. v. Village of Franklin Park, 4 Ill. 2d 304; Petropoulos v. City of Chicago, 5 Ill. 2d 270, 274. . . . .
>
> No one factor is controlling. It is not the mere loss in value alone that is significant, but the fact that the public welfare does not require the restriction and resulting loss. When it is shown that no reasonable basis of public welfare requires the limitation or restriction and resulting loss, the ordinance fails and the presumption of validity is dissipated. Krom v. City of Elmhurst, 8 Ill. 2d 104.) The law does not require that the subject property be totally unsuitable for the purpose classified but it is sufficient that a substantial decrease in value results from a classification bearing no substantial relation to the public welfare.

There was evidence introduced, that, other than the three medical centers and a parking lot, the character of the neighborhood in the immediate area of the subject property is residential. The trial court found this to be true. There was also evidence introduced that

plaintiff would get a substantial return on his original investment if the property was subdivided for residential purposes. Furthermore, there was evidence introduced that a traffic problem might arise in the immediate area.

Plaintiff's contention, that because there are other medical centers in the immediate area the proposed medical center should be allowed, is not controlling. The medical center proposed by plaintiff would be considerably larger than the medical centers in the surrounding area in that the proposed medical center would have space for 8 to 12 doctors' suites, containing treatment rooms, offices, assistant's stations, reception areas, waiting rooms, laboratories, lavatories and storage space. The medical center located immediately south of the subject property is used by only two doctors, and in physical appearance is similar to a residence. The doctor's office located across the street from plaintiff's proposed medical center is in a garage attached to a residence where the doctor and his family live. A professional building located a short distance south of the subject property is in an area classified B-3.

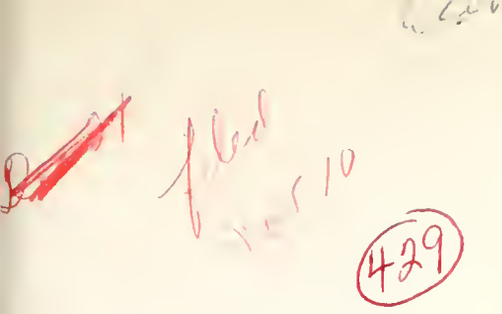
Plaintiff next contends that the demarcation between the R-2 and the B-3 district on the west side of highway is arbitrary and capricious. We disagree with plaintiff's contention. A continuation of 186th Street west would create an actual boundary line between the residence district, in which plaintiff's subject property is situated, and the commercial district. The sectioning of boundary lines, unless arbitrary or capricious, is a matter of legislative judgment which requires our respect. Plaintiff has failed to demonstrate that the boundary line is arbitrary or capricious. Bennett v. City of Chicago, 24 Ill.2d 270, 181 N.E.2d 96 (1962).

Finally plaintiff contends that the action of Village Board of Trustees in refusing to grant the variation recommended by the Zoning

Board of Appeals was arbitrary and capricious, and that this court should direct the Village Board of Trustees to adopt the recommended variation. This contention is without merit for the same reasons that we gave in a response to plaintiff's contention that the Zoning classification was invalid. The trial court found that plaintiff had not established that the action of defendant was arbitrary or capricious. A careful analysis of the evidence discloses no reason why we should not abide by this decision. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.



(64 I.A.2 429)

No. 64-90

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- WILBURN MORRIS, Defendant-Appellant.	Appeal from the Circuit Court of Hamilton County, Illinois.

Moran, J.

This is an appeal from a judgment of the Circuit Court of Hamilton County finding the defendant guilty of criminal contempt in a trial without a jury, wherein the court sentenced the defendant to fifteen days in jail and ordered him to pay a $100.00 fine.

The petition for contempt was filed and sworn to by the then State's Attorney of Hamilton County, who alleged that he petitioned for the Circuit Court of Hamilton County to call a special grand jury for the 17th day of October, 1963; that the defendant was the duly elected, qualified and acting Supervisor of the Town of McLeansboro, County of Hamilton and State of Illinois; that the

Clerk of the Circuit Court of Hamilton County, pursuant to an order of the grand jury, served a subpoena duces tecum on the defendant ordering him to produce "the supervisor's records for the defendant's term of office"; that on October 18, 1963 the Circuit Judge of said county did impound the records produced by the defendant until further order of the court; that on the first day of November, 1963, the defendant appeared before the grand jury and after certain questions were propounded to him he was told that he could leave but was instructed by the grand jury not to take the records that had heretofore been impounded by the grand jury. The petition then continues as follows:

> "8. On the 1st day of November, 1963, when the Grand Jury reconvened to redeliberate, said records were brought before the Grand Jury by the Sheriff of Hamilton County, and the Grand Jury began to deliberate, whereupon the defendant appeared before the Grand Jury and after certain questions were propounded to the defendant, the defendant asked the Grand Jury whether or not they had any further questions, and no further questions being asked the defendant, the defendant was informed that he could leave the presence of the Grand Jury. The Defendant

was instructed by the Grand Jury not to take records that had heretofore been impounded by the Grand Jury as the Grand Jury had not released the records. Whereupon the defendant argued violently with the Grand Jury and insisted that they were his records and he was going to take them from the Grand Jury and whereupon, the defendant got up from his chair and picked up the records from the table, and put them under his arm and started to leave with the impounded records, and when the defendant started to leave the Grand Jury Room with said records, the State's Attorney, who had been sitting in a chair next to the defendant, was standing facing the defendant, and the defendant stated to the State's Attorney of Hamilton County, "Van Winkle, you get out of my way," whereupon, the defendant shoved the State's Attorney backwards a distance of approximately 7 to 10 feet, almost into a glass-wood bookcase, and said pushing and shoving was done intentionally, wilfully, wantonly and without cause or justification and during the time the defendant was making his exit from the Grand Jury Room with the impounded records under his arm, certain members of the Grand Jury were instructing the defendant

to leave the aforesaid impounded records as the records had not been released by the Grand Jury. The State's Attorney of Hamilton County attempted to block the exit of the defendant from the Grand Jury Room by holding the door closed, whereupon the defendant appeared to take a crouched position and lunged at the State's Attorney with his head and shoulders; and the State's Attorney side-stepped the lunging or tackling of the defendant, and then the defendant did take a full swing that extended through the path of a half-circle with his right fist closed at the mid-section of the State's Attorney, and the State's Attorney did move backwards and the swing of the defendant did make contact with the suit coat of the State's Attorney, thereupon the defendant turned and left the Grand Jury Room. Whereupon the State's Attorney regained his position and left the Grand Jury Room and grabbed the impounded records that the defendant had locked under and in his left arm and hand. Whereupon the defendant grabbed the State's Attorney by his tie and at the same time placed a half-nelson hold around the neck of the State's Attorney. Thereupon the State's Attorney placed both arms around the mid-section of the De-

fendant and the State's Attorney and the Defendant re-entered the Grand Jury Room and in the Grand Jury Room the Defendant's act of pulling on the State's Attorney's tie had a choking effect and when the Defendant had the half-nelson around the State's Attorney, the Defendant attempted to throw the State's Attorney over his back and during this time the Defendant on more that one occasion did attempt to bite the left side of the State's Attorney's face near the cheek bone and the aforesaid episode was visible and witnessed by the Grand Jury and said act and/or acts of the Defendant named herein were intentional, wilful, wanton and in disrespect and disregard and and against the dignity of the People of the State of Illinois and such act and/or acts obstructed the administration of justice.

9. The Grand Jury was meeting in a room located on the second floor of the Court House in the County of Hamilton in McLeansboro, Illinois and said room is specifically located and known as the library room for the Honorable Charles E. Jones, Associate Circuit Judge of this Court.

10. The Defendant did get outside the deliberating room of the Grand Jury with the aforesaid impound-

ed records, and make his way from the second floor of the Court House to the first floor of said Court House and to the West door of the said Court House in McLeansboro, whereupon the State's Attorney informed Roy N. Rhodes to take the records from the Defendant because the Defendant was leaving the jurisdiction of the Grand Jury and the Grand Jury had not released the records and the records were impounded and the Judge of this Court, Charles E. Jones, was in the presence of Roy N. Rhodes and the Honorable Judge of this Court informed the defendant to release the impounded records to Roy N. Rhodes and the defendant announced that he was taking the records because they were his property and he was going to see a lawyer and whereupon the said Roy N. Rhodes announced to the Defendant that he was taking the records and the defendant released to Roy N. Rhodes the records and the said Roy N. Rhodes delivered the impounded records immediately to the Grand Jury which was deliberating.

11. At approximately 11:00 to 12:00 A. M., the Bailiff of the Grand Jury, Dwight Parmley, received a telephone call asking that he interrupt the Grand Jury deliberation and call the Foreman, Hayden

[illegible] and made his way from the [illegible] of the Court House to the [illegible] floor [illegible] Rhodes and to the third floor of the said Court House [illegible], investigating the Rhodes [illegible] [illegible] that Mr. Rhodes [illegible] take the records from the Defendant because the Defendant was leaving the jurisdiction of the Grand Jury and the Grand Jury had not [illegible] the records and the records were impounded and the Judge of this Court, Charles [illegible] Jones, was in the chambers of Hon. [illegible] and the Honorable Judge of this Court informed the Defendant to deliver the impounded records to Mr. [illegible] Rhodes and the Defendant announced that he was taking the records because they were his property and he was going to see a lawyer and thereupon [illegible] [illegible] the Defendant [illegible] he was taking the records and the [illegible] to Mr. [illegible] Rhodes the records and [illegible] Rhodes delivered the impounded records immediately to the Grand Jury which was deliberating.

11. At approximately [illegible] A. M. [illegible], the Bailiff of the Grand Jury, Dwight [illegible], received a telephone call asking that he interrupt the Grand Jury deliberation and call the foreman, Harmon

Allardin, to the telephone and said party did not announce their name to the Bailiff. The said Bailiff did call the Foreman, Hayden Allardin, from within the deliberating room and the Foreman did have a conversation with a person and said person announced to Hayden Allardin: "This is Morris, have you done anything yet", and then he said "Don't you let Van Winkle have them books". The conversation lasted a few minutes, whereupon the State's Attorney of Hamilton County went into the room where Hayden Allardin was talking on the telephone to the defendant and asked Hayden Allardin who he was talking to, and he said it was Mr. Morris. The State's Attorney did take the telephone from Mr. Allardin and inform Mr. Morris that it was not proper for him to have any discussion with a member of the Grand Jury outside the deliberating room and if he had anything to say he should come before the Grand Jury and the defendant did announce to the State's Attorney of Hamilton County that he had talked to the foreman of the Grand Jury and there was nothing that the State's Attorney could do about it and the State's Attorney knows that it was the defendant because the State's Attorney has conversed with the defendant by telephone and since the

year of 1960. The said incident of the defendant talking to the foreman of the Grand Jury was in a threatening, forceful and intimidating attitude and said incident caused the said Hayden Allardin to become highly excited and nervous and Hayden Allardin within a period of time of less than one hour, while at lunch, the telephone incident caused a pain in his chest and his breathing became difficult and precipitated a heart attack and caused the Foreman, Hayden Allardin, to suffer physical illness for more than three days and such illness was the most severe heart attack that Hayden Allardin had suffered in more than two years.

12. At no time did any members of the Grand Jury or any members of the Court give the defendant any cause, reason or justification to commit any of the aforesaid acts so committed by the defendant.

13. The aforesaid act and/or acts stated herein committed by the defendant were against the peace and dignity of the People of the State of Illinois and said act and/or acts were intentional, wilful, wanton and in disrespect of the Court and its process and did bring the Court disrepute and obstruct administration of justice.

* * *

WHEREFORE, THE PEOPLE OF THE STATE OF ILLINOIS PRAY:

(a) This Petition for Criminal Contempt be set for hearing forthwith and the Clerk of this Court be directed and ordered to give notice to the defendant by mailing a copy of the Amended Petition to the defendant's last known address, return receipt requested.

(b) The Clerk of this Court cause a copy of this Petition and notice of hearing be mailed to the attorney of record for the defendant in criminal causes Nos. 63-3018, 63-3019, 63-3020 and 63-3021, now pending in this Court.

(c) That upon the hearing of this Amended Petition for Criminal Contempt the defendant be adjudged guilty of criminal contempt of this Court and the Court find that the act and/or acts of the defendant were intentional, wilful, wanton and in disrespect of this Court and its process and such act and/or acts did bring the Court into disrepute and obstruct administration of justice.

(d) For any other relief that the Court may deem necessary, fit and proper to uphold the dignity and respect of this Court.

THEODORE VAN WINKLE
State's Attorney for Hamilton County, Illinois

The defendant moved to dismiss the petition prior to the hearing because it was so general and garbled that he was unable to determine from the petition what actual charges of contempt were being made against him. His motion was overruled.

The undisputed testimony indicates that the defendant was served a subpoena duces tecum on the 17th day of October, 1963, to appear before the grand jury of Hamilton County on the same day with all of his books and records for his term of office; that he appeared before the grand jury with his records on the 17th day of October, 1963 and was examined extensively on the 17th and 18th of that month. At the end of the grand jury session on the 18th, the defendant attempted to take his books and records with him but the grand jury voted to impound them until it met again on November 1. The Circuit Judge, on the request of the grand jury, entered an order directing that the records consisting of the supervisor's daily entry book and the treasurer's account book be kept by the Sheriff of Hamilton County until the further order of the grand jury of the Circuit Court. The defendant was again called before the grand jury when it reconvened on November 1,

1963 and asked more questions about his books and records. During these three days he was examined in great detail about a $578.23 check that had been issued and about two $10.00 checks and a $75.00 check that he had failed to issue.

The defendant testified that he appeared before the grand jury in answer to the subpoena duces tecum and testified on October 17, October 18 and November 1; that he answered all the questions put to him; that he wanted to take his records with him at the conclusion of his testimony on October 18, and the state's attorney said, "You can't take those records; I am going to have them impounded to use as evidence." After the judge entered the order impounding the records, the defendant understood they would be returned to him on November 1; that he was examined about two $10.00 checks and about a $100.00 check he hadn't issued to a certain person and was later indicted for not issuing one of the checks. He was never told at any time that he had a constitutional right not to answer questions. On November 1, 1963 when he started to leave with his books, the state's attorney told him he could not take the books because he was going to impound them. After a tussle with the state's attorney in the grand jury room, he went downstairs, with the

state's attorney following him. He there met a circuit judge who ordered him to turn the books over to a deputy sheriff, which he did. There was other conflicting testimony offered by both sides which we deem unimportant to the decision in this case.

After hearing all of the evidence in the case, the trial judge found the defendant guilty of criminal contempt and sentenced him to 15 days in the county jail and fined him $100.00. The judgment order did not set out any facts constituting the offense.

The defendant contends that the judgment order finding him guilty of criminal contempt is insufficient in law because it does not set out any facts constituting the offense; that his constitutional rights were violated and his conduct, which might otherwise have been contemptuous was provoked by officers of the court. The state contends that defendant's acts constituted indirect contempt and that therefore it was not necessary for the trial court to set out the facts constituting the offense in its judgment order.

Since in our view this was a direct contempt proceeding, it will not be necessary to pass upon the state's contention concerning the requirements for judgment orders in cases of indirect contempt.

In a direct contempt proceeding the order finding contempt and fixing punishment therefor must set out facts constituting the offense so fully and certainly as to show that the court was authorized to make the order. (People v. Howarth, 415 Ill. 499; In Re Estate of Kelly 285 Ill. App. 143, 365 Ill. 174). The grand jury is a constituent part of the court and contemptuous conduct before that body constitutes a direct contempt. (People v. Ryan, 412 Ill 54; People v. Skar, 30 Ill 2d 491.) Since the defendant was charged with improper conduct before the grand jury, he was charged with direct contempt and it was therefore incumbent upon the trial court to set out facts constituting the contempt fully and certainly. However, the judgment order in this case merely found the defendant guilty of criminal contempt without any statement of the facts constituting the offense. It is impossible to tell from this order whether the trial judge found the defendant guilty of one or all of the many charges made in the long, rambling, incoherent petition for contempt filed by the then state's attorney of Hamilton County. The judgment order in the present case is therefore invalid because the court made no findings of fact constituting the offense of which it found the defendant guilty and we must therefore reverse this case.

However, even if the judgment order were in proper form, our opinion would be the same for the Constitution of the State of Illinois provides that no person shall be deprived of life, liberty or property without due process of law. (Art. II, Sec. 2.) "A defendant, guilty or innocent, is entitled to a fair, orderly and impartial trial in accordance with the law of the land." (People v. Wagoner, 8 Ill 2d 188 at 198.) A person has a right to reasonable notice of the charge against him. (People v. Skar, 30 Ill 2d 491.)

The defendant was not served with the subpoena duces tecum, commanding him to produce all his township records, until the day the grand jury was impaneled. He obeyed the subpoena, appeared before the grand jury on three separate days and was examined in great detail about a $578.25 check which he had written and about three other checks, two for $10.00 each and one for $75.00, which he had not written. In his examination before the grand jury, he was badgered by a hostile state's attorney who frequently questioned the truthfulness of his answers. At no time was he ever advised by the state's attorney or by the grand jury of his constitutional right to refuse to answer questions which might tend to incriminate him or of his constitutional right to have counsel. He was indicted for official mis-

conduct in issuing the $578.25 check and refusing to issue the two $10.00 and one $75.00 checks.

The long, rambling petition for contempt (taking up 12 pages of the abstract) did not give the defendant reasonable notice of the charges against him so as to enable him to properly prepare his defense. Defendant's motion to dismiss this petition, made prior to the hearing, should have been allowed. In addition, the then state's attorney acted not only as the accuser but also as the prosecutor in the very case in which he was personally involved. In oral argument before this court, the present state's attorney, to his credit, stated in open court that he did not approve of the way the proceedings involving this defendant were handled before the grand jury.

For the foregoing reasons this case is reversed.

FILED
NOV 10 1965
CLERK OF THE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS

Publish Abstract Only.

CONCUR:

Edward C. Eberspacher, P. J.

Joseph H. Goldenhersh, J.

50346

DAVID ISRAEL,	)	(64 I.A.2 452)
	)	
Plaintiff-Appellant,	)	APPEAL FROM
	)	
vs.	)	CIRCUIT COURT,
	)	
YELLOW CAB COMPANY, A Corporation,	)	COOK COUNTY.
	)	
Defendant-Appellee.	)	

MR. JUSTICE KLUCZYNSKI DELIVERED THE OPINION OF THE COURT.

Plaintiff, David Israel, sued the defendant Yellow Cab Company for damages to his automobile incurred while parked in the street overnight. At the close of plaintiff's proof the court, in a jury trial, sustained defendant's motion for a directed verdict. Plaintiff appeals on the ground that the proof was sufficient to establish a prima facie case.

A witness, Miss Muriel Browne-Miller, testified that she resided in the second floor apartment at 6821 S. Clyde Avenue, Chicago. At approximately midnight on the night in question she retired to her front bedroom and had begun to "doze off" when she heard what sounded like one automobile striking another. She ran from her room into a sun porch which adjoined it, "in a matter of seconds". When she reached the window she saw a Yellow cab in the street. When asked how she knew it was a Yellow cab she replied that the car was not only yellow in color but it had the cab light on the top. It remained stationary at a southeasterly angle about one foot away from the right rear of one of the cars parked at the curb. "In a matter of seconds" it backed up and proceeded up the street. At the time she was able to hear a noise "like metal dragging on the street as it pulled away". The weather was clear, and the site was well illuminated by a mercury vapor street light. Because of the lateness of the hour, she returned to bed. The

next morning, a Sunday, she went down with her father to the site to "check out" the cars. There she saw the plaintiff's car and notified him. On cross-examination she said the vehicle, yellow in color, was a cab and that the light on top "said" cab. When asked: "But it didn't say Yellow Cab, did it?" she responded argumentatively, "Are there other cabs in Chicago that are yellow?" She saw no other cars proceeding in Clyde Avenue at the time.

Plaintiff made a request to call Albert Adler, a Yellow Cab Company safety supervisor, as an adverse witness under Section 60, and being denied this request called him as his own witness. On direct examination the witness testified that he was called by plaintiff's wife to investigate the damage to the car. He examined plaintiff's 1960 blue Mercury and found damage to the right rear quarter panel. He saw no yellow paint on the car. He took pictures which were introduced in evidence. He described the front of a Yellow cab, headlights, grill and the bumper. He said that a considerable portion of the front of a Yellow cab is chrome "just like any other car". The Yellow Cab Company has 13 garages in Chicago housing from 150, 200 to 250 cabs, depending upon the size of the garage. On an average normal day three quarters of the cabs are on the road. On cross-examination by defense counsel, he was asked whether based upon his many years of experience "as brought out by counsel here," he found that there was a Yellow cab involved. He responded: "Through the debris and through the scraping of her [sic] car you would have yellow paint on the right side of her [sic] car because the right side was damaged. The right rear of the tail light and bumper was pushed off to the... would mean the left front or left side of the cab would have been damaged". Plaintiff's objection was overruled. Plaintiff raises

no issue on appeal as to this testimony; we refer to it only to examine the nature of the evidence which the jury, in its province, had to consider upon the question of the sufficiency of plaintiff's proof.

In support of the trial court's directed verdict, defendant says that there was no testimony which linked the particular yellow vehicle or cab to the defendant; that the cab Miss Browne-Miller saw was yellow in color would not necessarily indicate it was one owned by the defendant; and further that there was no proof that the yellow automobile struck anything or that it was standing near the automobile owned by the plaintiff.

The issue here presents a question as to whether, when all the evidence adduced is considered together with all reasonable inferences therefrom in its aspect most favorable to the plaintiff, there is a total lack of evidence to prove the necessary elements of plaintiff's case. A party should not be deprived of his right to a jury trial if he has produced any evidence which proves or tends to prove his claim, or from which reasonable inferences can be drawn which tend to support his claim. On a motion for directed verdict for the defendant, the trial court must consider all of the evidence in its aspect most favorable to the plaintiff together with all reasonable inferences to be drawn therefrom, and if, when so considered, there is any evidence standing alone and considered to be true, together with the inferences that may legitimately be drawn therefrom, which fairly tends to support the plaintiff's case, the court should not direct a verdict in favor of the defendant. Willoughby v. Moyer, 50 Ill. App. 2d 462, 465, 466, 200 N.E.2d 522 (1964).

The questions of preponderance of the evidence or the

credibility of witnesses are not involved.

We believe that from the plaintiff's uncontradicted proof in its aspect most favorable to him, together with all reasonable inferences and intendments drawn therefrom, the jury could have reasonably found that a Yellow cab of defendant was involved and caused the damage to plaintiff's parked car. It is, therefore, our opinion that the trial court improperly concluded the matter at the close of plaintiff's case and for that reason we reverse the trial court's ruling and remand the cause for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

BURMAN, P.J., and MURPHY, J., concur.

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Richard C. Bleloch and Eugene J. Kelley, Jr.,of Chicago, for appellant.

Jesmer & Harris , of Chicago, for appellee.

49878

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
HENRY McCLELLAN,
Defendant-Appellant.

64 I.A.2d 453

APPEAL FROM
CIRCUIT COURT
COOK COUNTY
CRIMINAL DIVISION

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

In a trial without a jury Henry McClellan was found guilty of possession of a narcotic drug commonly known as heroin, as charged in an indictment, and sentenced to a term of imprisonment of not less than 3 years nor more than 10 years. He appeals from the judgment.

Initially testimony was adduced in a hearing on a motion to suppress evidence secured on an alleged unlawful arrest and search. Jimmy Roberts, a policeman, assigned to the Vice and Narcotic Control Division of the Chicago Police Department, testified that on November 29, 1963, at approximately 1:30 A.M., he and his partner, Harold Johnson, were on the corner of 63rd Street and Dorchester Avenue in Chicago. They were seated in a parked automobile. At that time they had a conversation with an informer by the name of Slick. He had provided information in the past and on three separate occasions his information had led to arrests. On one occasion he had attempted to make a sale of narcotics for the officers. Roberts further testified that Slick was a narcotic addict. In answer to a question by defendant's attorney, Roberts answered that he would accept what Slick "tells me. He has proven to be truthful in the past." On this occasion the informer told the two policemen, "That dude is dirty," simultaneously pointing out the defendant, who was walking in the vicinity. The expression, "That dude is dirty," meant that the defendant had narcotics on his person. The two

policemen then followed the defendant into a restaurant. A conversation was had with the defendant wherein he denied that he had any narcotics on his person. His trench coat, which was located on a stool next to him, was then searched. In the right front pocket was found a rubber thumb, containing 20 tin-foil packages. The defendant was asked what it was and he said "Jive," a colloquial expression for narcotics. His explanation was that he surreptitiously took the narcotics from a seller who had "stashed" or hidden the narcotics behind a can in an alley near 43rd Street. The defendant has been a narcotics addict since 1947.

The defendant was taken into custody and the 20 packages taken from him were delivered to the Chicago Crime Laboratory. The defendant stipulated that if policeman Roberts' partner were called to testify his testimony would be substantially the same. Based on this evidence the court denied defendant's motion to suppress the evidence. The defendant then stipulated that the evidence adduced during the motion to suppress would be the same at the trial and also that if the chemist from the Chicago Crime Laboratory were called he would testify that the packages submitted to him by policeman Roberts contained heroin. It was stipulated that on November 15, 1945, defendant was found guilty of larceny and sentenced to from 1 to 2 years in the Penitentiary; that on May 12, 1948, he was found guilty of armed robbery and sentenced to from 2 to 5 years in the Penitentiary and that on March 13, 1953, he was found guilty of robbery and sentenced to from 5 to 8 years in the Penitentiary.

The defendant, in urging reversal of the judgment, says that the arresting policeman did not have reasonable grounds to make the arrest and that consequently the search and seizure were illegal. He maintains that the reliability of the informer was not proved and that the mere accusation of an addict that a certain person is in possession

of narcotics, without stating the underlying facts upon which belief is based, is not sufficient to justify an arrest without a warrant. The policemen testified that on approximately three separate occasions the informer had supplied information which had led to arrests and that on one occasion he had attempted to make a controlled sale of narcotics. We think that the record supports the finding that the reliability of the informant was established and that the arrest and search were lawful. See People v. McFadden, 32 Ill.2d 101; Certiorari denied by U.S. Supreme Court on October 11, 1965, McFadden v. Illinois, October 1965 Term, Docket No. 29 Misc. See also Draper v. United States, 358 U.S. 307 and People v. McCray, 33 Ill.2d 66.

The informer, through his past actions, had proven himself to be reliable. He approached the two policemen, and, in the language of the street, informed them that the defendant had narcotics on his person. In the instant case, as in McFadden, the policemen had more than just the tip from a person characterized as credible. The informant had proven to be credible in the past on three separate occasions. The defendant testified that he purloined the narcotics.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, J., and LYONS, J., concur.

49947

CATHERINE P. SCHOEFFLER,

Plaintiff-Appellant,

v.

THE VILLAGE OF OAK PARK, a Municipal Corporation, and GLENN SUNDE, Commissioner of Public Works of the Village of Oak Park and J. M. Corbett Co., an Illinois Corporation,

Defendants-Appellees.

64 I.A.2d 454

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

A

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Catherine P. Schoeffler filed a three count amended complaint in Chancery for an injunction restraining the Village of Oak Park and J. M. Corbett Co. from the widening of Washington Boulevard between Maple and Harlem Avenues in Oak Park, from removing any trees on the parkway therein, from in any way implementing a resolution of May 21, 1962, adopted by the Board of Trustees of the Village authorizing the project, for attorney's fees, for a direction that protective guard rails be installed between plaintiff's property line and the sidewalk, that Glenn Sunde be required to give an accounting of his income as Kip Engineering Company for a reasonable period before and since becoming Commissioner of Public Works for the Village, that the Trustees of the Village be required to hold a public meeting preceded by reasonable notice as to the resolutions providing for the improvement and that the Village and Board of Trustees be required to pass a resolution nullifying the previous resolution providing for the widening. Defendants answered and plaintiff replied. Thereupon the defendants move for a summary judgment supported by an affidavit. Plaintiff filed a reply to the motion for summary judgment supported by a counter-affidavit. On November 15, 1963, the court entered a summary judgment in favor of defendants and dismissed the complaint. There was no appeal from this final order. On April 20, 1964, plaintiff filed a petition which she calls a motion (under Section 72 of the Civil Practice Act) asking that the cause be

reinstated; that she be allowed to file amended pleadings; that the defendants be required to answer and for such other relief as may be just. She supported her petition with an affidavit and certain exhibits. The Village filed an answer and an affidavit, accompanied by an exhibit. The court denied plaintiff's petition. Plaintiff, appealing, prays that the order be reversed and that the cause be remanded with directions to hold hearings, ascertain damages and determine whether other relief shall be awarded.

For a long time prior to the filing of the complaint, plaintiff, a widow, owned the fee title to land known as 401 South Maple Avenue, being a corner lot fronting on Maple, paralleling Washington Boulevard on its north side for 172 feet and extending west to Harlem Avenue. Harlem Avenue at this intersection is the dividing line between Oak Park and Forest Park. On May 21, 1962, the Oak Park Village Trustees passed a resolution for the improvement of Washington Boulevard to include: (a) widening from Harlem Avenue east to Maple Avenue, (b) widening from Austin Avenue west one-half block, (c) repairs of curbs and pavements and (d) resurfacing the Boulevard. Washington Boulevard is also known as U. S. Highway 20 and State Route 5. Motor fuel tax monies accrued to the Village were to be used. The project was approved by the State Highway Department. No notification to property owners affected by the proposal was given. No public hearings were announced or scheduled. The contract was let and the improvement was completed. When the project was accomplished, plaintiff's frame house was 9 feet from the edge of the road and her frame store building on the corner of Washington Boulevard and Harlem was 7 feet 5 inches from the edge of the roadway. The widening at the intersection at Harlem Avenue was to provide a left turn lane. The widening of the roadway was within the existing right of way. The part of the roadway widened consisted of the parkway on each side of the street between the street and the existing sidewalk. The record shows that the entire 66 foot right of way was dedicated by plat in 1869. The widening was done by

Corbett Construction Company pursuant to a contract with the State of Illinois. The Village was not a party to the construction contract. No special assessments were levied in connection with the improvement and no part of plaintiff's property was taken. The defendant, Glenn Sunde, had not been employed by Forest Park for over 3 years at the time of the construction. There was no showing made by plaintiff of interest on the part of Sunde other than speculation.

Plaintiff maintains that she has a right to seek relief under Section 72 of the Civil Practice Act because she discovered about 5 months after the judgment was entered that certain matters, alleged in the affidavit, supporting defendants' motion for the judgment were untrue and constituted a constructive fraud upon the court. A motion under Section 72 of the Practice Act cannot be used as a substitute for an appeal. The ordinance of the town of Cicero now relied upon by the plaintiff is the original improvement ordinance for the paving of a part of the dedicated right of way of Washington Boulevard and was available to plaintiff prior to the motion for summary judgment. To set aside a judgment pursuant to Section 72 of the Practice Act, plaintiff must set forth facts showing that she was prevented from having a fair trial or hearing on the issues. Facts that simply constitute additional evidence are not relevant. Plaintiff's petition and affidavits show additional evidence and nothing to indicate that she did not receive a full and complete hearing in the original trial. Plaintiff calls attention to her diligence in gathering evidence after the summary judgment was entered. The time for diligence was before the judgment was entered.

We agree with the defendants that the local improvement act provisions requiring a public hearing are not applicable to the widening of Washington Boulevard because plaintiff's property was not assessed pursuant to this act. No public hearing was required by law for this improvement. The Village did not widen the street. If it had widened

the street it would have the right to do so. See Articles 11-80-2 and 11-61-2 of Chapter 24, Ill. Rev. Stats. 1963. The summary judgment was the proper remedy because there were no disputed issues of material facts. The State of Illinois had the right to pave Washington Boulevard within the dedicated right of way whether the plat was a statutory or a common law plat. If the Village had jurisdiction over the Boulevard it would have a right to pave within the dedicated right of way. In Gridley v. City of Bloomington, 88 Ill. 554, the court said, 556:

> "It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality."

It makes no difference whether the State of Illinois has an easement (common law plat) or fee (statutory plat) for roadway purposes, as the state would have the right to pave it in either event. The public had a right to rely on the dedication of the entire 66 foot right of way of Washington Boulevard and had a right to use the entire right of way for street widening purposes.

The record shows a substantial basis for the entry of the summary judgment and for the subsequent denial of Section 72 of the Civil Practice Act. Therefore the order denying plaintiff relief is affirmed.

ORDER AFFIRMED.

BRYANT, J., and LYONS, J., concur.

49766

64 I.A.2 455

LUDWIG A. HIRZ, Plaintiff-Appellee, v. STEPHEN LEE and LILLIAN H. LEE, Defendants-Appellants.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO, FIRST MUNICIPAL DISTRICT, CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered in favor of plaintiff-appellee in the Municipal Court of Chicago, First Municipal District, Circuit Court of Cook County, in the amount of $1,224.00.

This is an action for work, labor and materials. Plaintiff's Statement of Claim alleged that carpentry work and labor were performed and materials furnished on premises located at 1237 Carmen Avenue, Chicago, Illinois. Plaintiff also alleged that his account with defendants became an account stated on August 1, 1960. Defendants' Answer to the Statement of Claim admitted that the carpentry work had been performed, but further alleged that the work was performed in an unworkmanlike manner. On August 3, 1961, plaintiff requested a Bill of Particulars. Defendants filed a Bill of Particulars alleging in detail the unworkmanlike quality of the work. Defendants also stated in their Bill of Particulars that the aforesaid work of plaintiff was performed without the procurement of a permit or approval of the plans by the City of Chicago. Defendants then presented a Motion for Summary Judgment alleging that the failure of plaintiff to procure a permit made any contract between the parties illegal and, as a matter of law, unenforceable. This motion was sustained and plaintiff appealed.

In Hirz v. Lee, 41 Ill. App.2d 145, 190 N.E.2d 607 (1963), this court held that the failure to procure a permit would be illegal only if plaintiff was to procure the permit and that a determination, as to which party was to procure the permit, was a jury question. The court reversed the action and remanded it to the lower court for trial.

At the trial, plaintiff presented evidence on a quantum meruit theory for work, labor and services performed and a quantum valebant theory for materials supplied. There was no evidence presented as to the account stated. Plaintiff also presented evidence that defendants had promised to get a permit from the Building Department of the City of Chicago.

Defendants presented evidence that the work performed by plaintiff was not performed in a workmanlike manner. Defendants also presented evidence that plaintiff was to get the building permit; that plaintiff, in performing the carpentry work, had not complied with the Building Code of the City of Chicago; and that an express contract existed between the parties in which they agreed that certain conditions were to be met by plaintiff. In support of the latter contention, evidence was submitted that defendant, Lillian H. Lee, contacted Architect Stauber and requested him to prepare plans for a remodeling of the residence; that Stauber agreed to furnish the plans and do the required work for not more than $5,000.00; that Stauber also agreed to hire others to perform the actual remodeling; and that plaintiff was hired by Architect Stauber, his wages set at $5.20 per hour, said sum being agreed upon by defendant, Lillian H. Lee.

It is plaintiff's position that he performed certain work and supplied materials and that because the jury rendered a verdict in his favor, they must have necessarily found that: one, plaintiff performed the work in a workmanlike manner and supplied the necessary materials; and two, that defendants were the parties to procure the permit.

It is defendants' position that: one, the verdict of the trial court is contrary to the manifest weight of the evidence; and two, the trial court committed prejudicial error by excluding certain testimony and exhibits of defendants and by refusing instructions relevant to defendants' theory of the case.

Under the Civil Practice Act, Illinois Revised Statutes, (1963) Chap. 110, Sec. 33 (1), the common counts shall not be used. Actions for work, labor and services and for materials furnished were, at common law, classified as common counts and were frequently referred to as actions in quantum meruit and quantum valebant respectively. There has been a tendency by the courts, however, to treat such actions as one in general assumpsit. Beatrice Foods Co. vs. Gallagher, 47 Ill. App.2d 9, 197 N.E.2d 274 (1964). An action in general assumpsit is brought on the theory that an implied promise is raised by the existence of an executed consideration. We conclude that plaintiff can recover on his Statement of Claim if facts of an executed consideration exist.

Defendants admit the performance of work by plaintiff. The only issue raised by defendants' Answer was that the work was not performed in a workmanlike manner. The jury heard the evidence relating to this issue and found in favor of plaintiff. An examination of the record reveals there was sufficient evidence for the jury to so find. We will not disturb that result.

Defendants further allege, in support of their contention that the verdict of the jury was contrary to the manifest weight of the evidence, that defendants introduced evidence, through the testimony of defendant, Lillian H. Lee, that plaintiff was to procure the permit. There was also, however, testimony by Richard Stauber, the architect who drew the plans for defendants, that defendant, Lillian Lee, informed him that her husband, defendant, Stephen Lee, would procure the permit. The jury heard all the evidence and found in favor of plaintiff and we will abide by their findings.

Defendants next allege that error was committed by the trial court. The first allegation of error concerns the testimony of Donald Nordine concerning plaintiff's non-compliance with the Building Code of the City of Chicago. Defendants contend that this testimony should have been admitted to show that the contract was illegal. We disagree with

the defendants' contention. This issue was not raised in defendants' Answer. Furthermore, it was not raised in the defendants' Bill of Particulars. Any evidence regarding non-compliance with the Building Code was properly stricken as being immaterial to the issues of the case. The defendants' Exhibit No. 1, showing how the work did not comply with the Building Code, was properly stricken for the same reason.

The defendants' second allegation of error is that all of defendants' instructions, six in number, were improperly refused by the trial court. A careful examination of the six instructions reveals that they were properly refused by the trial court. There was no error committed.

For the above reasons, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.